Supreme Court, U.S.
FILED
JUL 16 2007
OFFICE OF THE CLERK

No. 07-62

In The
# Supreme Court of the United States

HECK VAN TRAN,

*Petitioner,*

vs.

STATE OF TENNESSEE,

*Respondent.*

**On Petition For Writ Of Certiorari To The Tennessee Court Of Criminal Appeals**

## PETITION FOR WRIT OF CERTIORARI

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## CAPITAL CASE

## QUESTIONS PRESENTED FOR REVIEW

Does the failure of the states to apply a uniform clinical definition of mental retardation and to interpret the definition in accord with scientific principles violate the Eighth and Fourteenth Amendments to the United States Constitution?

Do the states violate Due Process of Law by using factfinding procedures to evaluate a defendant's mental retardation that produce unreliable and inconsistent results and that cannot be reconciled with a reasonable interpretation of *Atkins v. Virginia*?

Does the failure of the states to require that a jury determine whether a capital defendant is mentally retarded, beyond a reasonable doubt, before the defendant may be sentenced to death violate the Sixth Amendment and the principles of *Apprendi v. New Jersey* and *Ring v. Arizona*?

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James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. (ABA) 11 ..... 8, 15

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Tennessee Supreme Court Opinion

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Tennessee Court of Criminal Appeals Opinion

*Van Tran v. State*, No. W2005-01334-CCA-R3-PD (Tenn. Crim. App. Nov. 9, 2006)

## STATEMENT OF THE BASIS FOR SUPREME COURT JURISDICTION

On April 16, 2007, the Tennessee Supreme Court denied Petitioner permission to appeal, Pet. App. 110, a decision of the Tennessee Court of Criminal Appeals. Pet. App. 1. The appellate court decision affirmed a lower court's finding that Petitioner had failed to prove by a preponderance of the evidence that he was mentally retarded. Pet. App. 57. No rehearing was sought. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257 and for the reasons set forth in Rules 10(b) and (c) of the Rules of the Supreme Court of the United States.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI is reproduced in the appendix at Pet. App. 111.

U.S. Const. Amend. VIII is reproduced in the appendix at Pet. App. 111.

U.S. Const. Amend. XIV is reproduced in the appendix at Pet. App. 111.

Tennessee Code Annotated § 39-13-203 is reproduced in the appendix at Pet. App. 111-12.

## STATEMENT OF THE CASE

Heck Van Tran, Petitioner, was born in Saigon, Vietnam, in 1966, the child of a Vietnamese woman and an American serviceman who was killed two years later. He was very sick during infancy – experiencing high fevers and seizures – and he did not speak at all until he was six years old. His muteness was the likely result of neurological impairments in early childhood that affected his subsequent learning and development. When Petitioner did begin to speak, both his speech and articulation were abnormal; consequently, he never acquired more than the most basic skills in his native Vietnamese, and even as an adult, his language abilities in Vietnamese are described as simple and child-like by Vietnamese-speaking professionals and lay persons.

Because Petitioner was of mixed heritage, he and his mother were shunned by the Vietnamese. Children of American servicemen and their mothers were referred to in Vietnam as "bui doi," which translates to "dust of life." These social constructs forced Petitioner and his mother into the New Economic Zone and eventually into the streets. Petitioner lived sporadically in orphanages, but was returned to Saigon in March 1975, a month before it fell to the Communists. Thereafter, he and his mother were sent to a labor camp and subsisted under extremely harsh conditions for two years. When they escaped and made their way back to Saigon, they had no official papers and lived in fear of being recaptured and returned to the labor camp.

Petitioner's early life was beset with circumstances and conditions that are identified as risk factors for mental retardation.[1] His mother had limited cognitive

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[1] While causation is rarely certain and proof of causation is "not necessary for the diagnosis [since] the disability is defined by the dysfunction itself," Dick Burr, *A Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation*, § 3.1 (2d ed. 2006), the

(Continued on following page)

abilities. She was poor, malnourished, unprepared for parenthood, and without access to prenatal care. During her pregnancy, she was ill, smoked cigarettes, and was injured by a fall. From the time of his birth, Petitioner suffered from seizures, malnutrition, and inadequate family support. Through most of his childhood, he experienced social deprivation, a lack of adequate stimulation, inadequate safety measures, abuse and neglect, family poverty, a lack of educational services and opportunities, and a lack of medical care. Twice, he suffered traumatic injuries, including a near drowning.

Despite severe adversity, Petitioner and his mother managed to survive until the Catholic Charities organization relocated them to Memphis, Tennessee, in 1983, when Petitioner was seventeen years old. Van Tran was enrolled in public school, and although his attendance was good, his grades were not. He was described as a below-average student. Achievement tests[2] administered to him when he was seventeen showed that he read and spelled at below a fourth-grade level. Petitioner learned at a slower rate than other students for whom English was a second language. Petitioner left school after one year and worked at a variety of menial jobs, the last of which required him to cut wood to preset lengths and clean up a supply yard.

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mental health profession has identified "risk factors" and concluded generally that "[m]ental retardation can be caused by any condition that impairs development of the brain before birth, during birth or in the childhood years." The ARC, *Causes and Prevention of Mental Retardation* (May 2005) (may be viewed at www.thearc.org/NetCommunity/Document.Doc). *See* Dennis W. Keyes, William J. Edwards, Timothy J. Derning, *Mitigating Mental Retardation in Capital Cases: Finding the "Invisible" Defendant*, 22 Mental & Physical Disability Law Reporter 529 (1998).

[2] An expert testified that because achievement tests are "strongly correlated" with IQ, Petitioner's poor performance on the tests indicated that his sub-average intellectual functioning manifested in the developmental period. The expert also testified that Petitioner continued to read at the level at which he read at age seventeen despite nine years of study in the prison's G.E.D. program.

In October 1987, Petitioner and three other Asian youths robbed the Jade East Restaurant in Memphis and killed three people. Petitioner and his companions fled Memphis. Petitioner was arrested in Houston, Texas. After being read his rights, Petitioner signed a confession, written by law enforcement officers in English, confessing to the murders.

Petitioner was tried and convicted and sentenced to three death sentences. The Tennessee Supreme Court found insufficient evidence of the aggravating circumstances used to impose two of the death sentences and remanded for resentencing. *State v. Van Tran*, 864 S.W.2d 465 (Tenn. 1993). Petitioner was resentenced to two life sentences, but the third death sentence remains.

Pursuant to state law, Petitioner sought post-conviction relief alleging, inter alia, three errors based upon his mental condition, including "whether Petitioner's execution is prohibited because he is mentally retarded."[3] The trial and appellate courts denied relief, *Van Tran v. State*, No. 02C01-9803-CR-00078 (Tenn. Crim. App. April 1, 1999), *aff'd*, 6 S.W.3d 257 (Tenn. 1999), *cert. denied*, 529 U.S. 1091 (2000).

Petitioner's attempt to reopen his post-conviction petition was initially denied, but ultimately allowed by the Tennessee Supreme Court, after that court held "that the execution of mentally retarded individuals fails to achieve legitimate penological objectives for punishment as required by the Tennessee and United States Constitutions." *Van Tran v. State,* 66 S.W.3d 790, 809 (Tenn. 2001). In December 2001, the Tennessee Supreme Court remanded Petitioner's case to the trial court to "make a determination as to Petitioner's alleged mental retardation." *Id.* at

[3] The Tennessee statute barring the execution of the mentally retarded, Pet. App. 111-12, took effect on July 1, 1990; the murders were committed in 1987.

790. Prior to the conclusion of the hearings at the trial court level, this Court decided *Atkins v. Virginia*, 536 U.S. 304 (2002), which held that the Eighth Amendment to the United States Constitution barred the execution of the mentally retarded, and the Tennessee Supreme Court decided *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), requiring death-sentenced inmates to prove their mental retardation by a preponderance of the evidence.

At and before the hearings, Petitioner presented testimony, exhibits, and an affidavit from three board-certified psychologists who specialize in evaluating bicultural individuals for mental retardation and in neuropsychological evaluations. The experts used standardized instruments measuring intelligence, adaptive behavioral skills, and brain function; reviewed Petitioner's medical records, his sparse social and educational records, his occupational history, and the facts of the crime; and interviewed Petitioner's mother, his trial counsel, his trial psychologist, treating physicians, and prison staff. A bilingual psychologist performed a comparative evaluation of Petitioner's skills in Vietnamese and English and concluded that, although impaired in the use of both languages, Petitioner's English skills were stronger than his Vietnamese skills. Every expert concluded that Petitioner met the definition of mental retardation set forth in Tennessee state law. The state did not call a single expert or lay witness and did not present any documentary evidence challenging Petitioner's proof.

The trial court agreed that Petitioner had established by a preponderance of the evidence that he had "significantly subaverage intellectual functioning." The trial court also found "overwhelming proof that the Petitioner suffers from deficits in the area of communication" but found "no deficits" in other areas of adaptive behavior. Contrary to the uncontradicted opinions of the experts, the court concluded that Petitioner had failed to establish "manifestation during the developmental period." Pet. App. 86, 103, 108. The appellate court affirmed, but substituted its

subjective interpretation of the facts of the crime for the uncontradicted expert opinion. Pet. App. 51-52. The Tennessee Supreme Court denied review. Pet. App. 110.

## REASONS FOR GRANTING THE WRIT

This Court should grant this Petition for Certiorari to resolve the conflicting decisions reached by dozens of courts struggling to implement *Atkins*. These numerous inconsistent decisions have created an environment in which the Eighth Amendment takes on different meanings in different states; in which fundamental due process is violated by flawed factfinding procedures; and in which the Sixth Amendment right to a trial by jury is denied.

## ARGUMENT

### I. The failure of the states to apply a uniform clinical definition of mental retardation and to interpret that definition in accord with scientific principles violates the Eighth and Fourteenth Amendments to the United States Constitution.

This Court held in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment bans the execution of mentally retarded individuals. One of the underlying foundations of the *Atkins* decision is that the Eighth Amendment prohibits the execution of mentally retarded defendants because their execution does not serve the penological purposes of capital punishment. As this Court noted in *Atkins,* defendants who suffer from mental retardation are protected from execution because their cognitive impairments do not enable them to possess the level of culpability that society deems essential to the imposition of the ultimate punishment. *Id.* at 319. Since the execution of the mentally retarded fails to "measurably contribute to the retributive end" of capital punishment, *Enmund v. Florida*, 458 U.S. 782, 801 (1982), it violates the Eighth Amendment's "narrowing jurisprudence" which seeks to ensure that only the "most deserving of execution are put to death." *Furman v. Georgia*, 408 U.S. 238 (1972);

*Godfrey v. Georgia*, 446 U.S. 420 (1980); *Lowenfield v. Phelps*, 484 U.S. 231 (1988) (Eighth Amendment requires that class of defendants eligible for capital punishment be narrowed "to provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not."). Thus, in *Atkins* this Court held that "pursuant to our narrowing jurisprudence, which seeks to ensure that only the most deserving of execution are put to death, an exclusion for the mentally retarded is appropriate." *Atkins*, 536 U.S. at 316 ("society views mentally retarded offenders as categorically less culpable than the average criminal").

Because the Eighth Amendment prohibits the execution of the entire class of mentally retarded defendants, states must apply consistent standards and reliable procedures for determining who is mentally retarded. While this Court declined to adopt a uniform definition of mental retardation in *Atkins*, this Court did place a "substantive restriction" on the "state's power to take the life" of a mentally retarded defendant. *See generally Panetti v. Quarterman,* 551 U.S. at ___, 2007 WL 1836653, at *24-25 (June 28, 2007) (quoting *Ford v. Wainwright,* 477 U.S. 399, 405, & 409-10 (1986)) (Eighth Amendment prohibits execution of "one whose mental insanity prevents him from comprehending the reasons for the penalty or its implications"). The states' application of inconsistent definitions of mental retardation violates this "substantive restriction," and thus the Eighth Amendment to the United States Constitution.

### A. A Uniform Scientifically Valid Definition is Constitutionally Required

While this Court deferred to the states "the task of developing appropriate ways to enforce the constitutional restriction" against executing the mentally retarded, it nonetheless recognized that "statutory definitions ... generally conform to the clinical definitions." *Atkins*, 536

U.S. at 317 & n.22. Those clinical definitions, cited by the Court in footnote 3 of *Atkins*, *id.* at 309 n.3, are devised by the American Association on Mental Retardation (AAMR) and the American Psychiatric Association (APA), the two most prominent professional organizations devoted to diagnosing and supporting the mentally retarded. While the definitions vary slightly, the two are conceptually the same.

What is most important is this: mental retardation is a single diagnostic entity. The definitions provided by the AAMR and the APA both describe the same small group of individuals. James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 Mental & Physical Disability L. Rep. (ABA) 11, 12-13. Every individual in the group is protected from execution by the Eighth Amendment. Moreover, as one federal judge has observed: "both the AAMR and DSM-IV-TR definitions reflect a national consensus. Thus, to the extent there is a conflict, should a defendant meet *either* definition, his execution is prohibited." *United States v. Nelson*, 419 F.Supp.2d 891, 894-95 (E.D. La. 2006).

In the aftermath of *Atkins*, state legislatures have not adopted a uniform definition of mental retardation; neither have state courts engaged in consistent interpretations or applications of the definitions. The resulting incongruity creates a perverse result: the Eighth Amendment takes on different meaning in different states. Even if every state faithfully applies *its* own laws, constitutional violations will occur. What exists is an environment in which the full scope and protection of a fundamental constitutional right is wholly contingent upon the definition and procedure chosen by the state. Notwithstanding the fact that mental retardation is a single diagnostic entity, the same individual can be found mentally retarded in one state, and, consequently, spared execution, but executed in another.

States vary significantly in their chosen definition. Most state statutes quote verbatim or substantially from one of the clinical definitions. *See e.g.*, Ariz. Rev. Stat. § 13-703.02(k)(3) (2006); Tenn. Code Ann. § 39-13-203 (2006 Repl.); Wash. Rev. Code § 10.95.030. Some state legislatures provide a specific definition that borrows from, but does not replicate, clinical definitions. *See e.g.*, Kan. Stat. Ann. § 21-4623 & § 76-12b01 (1995) (supplementing clinical definition with requirement that condition "substantially impairs one's capacity to appreciate the criminality of one's conduct or conform one's conduct to the requirements of law"); Mo. Rev. Stat. § 565.030(6) (2007 Supp.) (adding that deficits "and limitations" must be "continual [and] extensive"); N.Y. Crim. Proc. § 400.27(12) (2005). Still other statutes, notably the federal statute, include no definition at all. 18 U.S.C. § 3596(c) (2006) ("A sentence of death shall not be carried out upon a person who is mentally retarded.").

Some states that rely upon a clinical definition of mental retardation in their criminal statutes choose the 2002 definition of the American Association of Mental Retardation,[4] the definition that reflects the most current scientific research. *See e.g.*, Ca. Penal Code § 1376 (2007 Supp.); La. Stat. Ann. C.Cr.P. art. 905.5.1(h)(1) (2007 Supp.). The 2002 AAMR definition was adopted to "state, describe, organize, and extend the thinking in the field of mental retardation that has occurred over the past 10 years." The 1992 definition, cited by this Court in *Atkins*, was revised to be consistent with the "widely used assessment instruments and the research supporting them [and]

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[4] Mental retardation is defined as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical skills. This disability originates before age 18." American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Support* (10th ed. 2002) at 1 (hereafter referred to as AAMR, 2002).

with the relevant inquiries in [the] criminal justice context." Peggy M. Tobolowsky, Atkins *Aftermath: Identifying Mentally Retarded Offenders and Excluding Them From Execution*, 30 Journal of Legislation 77, 97 & 100 (2003) (hereafter Tobolowsky). Thus, the definition of mental retardation set forth in the 2002 AAMR based on the most recent scientific research is the most accurate and reliable definition.

Because mental retardation is a single diagnostic entity, and a medical construct,[5] the use of varying definitions can literally mean the difference between life and death. Surely the "Eighth Amendment must have the same content in all United States jurisdictions." *Pruitt v. State*, 834 N.E.2d 90, 108 (Ind. 2005). While a state may impose a higher standard, the "minimum definition of mental retardation sufficient to meet the national consensus must be uniform" and must generally conform with clinical definitions. *Id.*

### B. Inconsistent Judicial Interpretations Result in Inconsistent, Unconstitutional Decisions

Moreover, inconsistent judicial interpretations of the definitions heighten the problem. The 2002 AAMR definition includes three components: (1) "significant limitations in intellectual function" and (2) "in adaptive behavior as expressed in conceptual, social and practical skills" (3) "originating before age 18." AAMR, 2002, at 1. Inconsistent judicial interpretations of each of these three components have created a hodgepodge of state decisions which arbitrarily and unfairly impose death sentences.

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[5] "[I]nsanity is a legal construct . . . and arguably appropriate for legislative action. [It] is clearly distinguishable from mental retardation, which is a recognized biopsychosocial condition more suitable to description by skilled mental health professionals." Phyllis Coleman & Ronald A. Shellow, *Toward a Uniform Standard for Mental Retardation in Death Penalty Cases*, 41 Mental Retardation 203, 204 (June 2003).

### 1. Disparate Interpretations of Intellectual Functioning Result in Inconsistent, Unconstitutional Decisions

Despite clear precaution from the scientific community,[6] AAMR (2002) at 57 ("[IQ] scores are insufficiently precise to utilize a fixed cutoff in this context"), Tennessee courts have interpreted the definition of mental retardation to include two mandatory cutoffs, one for intellectual functioning and one for age of onset. The Tennessee Supreme Court has interpreted the first criterion of the Tennessee statute, "significantly subaverage general intellectual functioning as evidenced by a functional intellectual quotient (I.Q.) of 70 or below," Pet. App. 111-12, to create a "bright-line cutoff" of seventy, not allowing for the mental health profession's standard measurement of error. *Howell,* 151 S.W.3d at 456. Additionally, the Tennessee appellate court has held, in a case that is pending on appeal, that the third criterion – manifestation during developmental period, or by age eighteen – also creates a bright-line cutoff. *State v. Strode,* No. M2005-00906-CCA-R9-DD (Tenn. Crim. App. 2006), *appl'n for perm'n to appeal granted.*

By contrast, other courts and judges have heeded the profession's concern about bright-line IQ cutoffs, noting that the tests have a standard measurement of error of plus or minus five points. *See In re Hawthorne*, 105 P.3d 552, 557 (Ca. 2005) ("a fixed cutoff is inconsistent with established clinical definitions") (quoting AAMR, 2002, at 57); *see also Pruitt v. State*, 834 N.E.2d at 106 ("IQ tests

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[6] Douglas Mossman, Atkins v. Virginia: *A Psychiatric Can of Worms,* 33 N.M. L. Rev. 255, 269-70 (Spring 2003) ("[u]nder the best condition, IQ tests have a 'measurement of error' of about five points"); Peggy M. Tobolowsky, at 96 (2003) ("[A]ny state's use of a fixed IQ cutoff score, without reference to standard measurement error and other factors concerning the specific instrument used, risks an inaccurate assessment of the intellectual functioning component of the mental retardation definition.").

are only evidence; they are not conclusive [proof of] the subject's IQ"); *Commonwealth v. Miller,* 888 A.2d 624 (Pa. 2005) ("consistent with both [] classification systems, we do not adopt a cutoff IQ score"); *Bowling v. Kentucky,* 163 S.W.3d 361, 388 (Ky. 2005) (Keller, J., dissenting) ("A[n IQ] *score* is merely evidence of a person's actual IQ" which "might also come [via] expert testimony as to margin of error of a given testing procedure"). Other courts have rejected IQ cutoffs, not based on the standard measurement of error, but based on the age of the testing instrument and the phenomenon known as the "Flynn effect" which results in heightened scores over the life of the test. *Id.* (Keller, J., dissenting) (recognizing so-called "Flynn effect").[7]

Still other states have created rebuttable presumptions of mental retardation based on the IQ test results alone. *See e.g.*, Ariz. Rev. Stat. Ann. § 13-703.02 (2006) (IQ of 65 or below creates rebuttable presumption); Ark. Code Ann. § 5-4-618 (2006 Repl.) (same); Neb. Rev. Stat. § 28-105.01 (2006 Supp.) (IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence); N.M. Stat. Ann. § 31-20A-2.1 (2000 Repl.) (IQ of 70 or below on a reliably administered IQ test shall be presumptive evidence). Conversely, at least one state statute provides that an IQ score exceeding seventy is "presumptive evidence that the defendant does not have significant subaverage general intellectual functioning." S.D. Codified Laws § 23A-27A-26.2 (2004), *but see* S.D. Codified

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[7] Kenneth Weiss, Barbara Haskins, & Mark Hauser, *Commentary:* Atkins *and Clinical Practice*, 32 J. Am. Acad. Psychiatry Law 309, 310 (2004) ("A test version that is outdated could lead to an inflated score – with potentially lethal results."); *Timing of IQ Test Can Be a Life or Death Matter*, Science Daily Magazine (Dec. 6, 2003) ("IQ scores tend to rise 5 to 25 points in a single generation. This so-called "Flynn effect" is corrected by toughening up the test every 15 to 20 years to reset the mean score to 100.") (study published in 58 American Psychologist 778 (October 2003)).

Laws § 27B-1-17, -18 (2004) (South Dakota mental health definition of mental retardation creates no presumption). And still other states, in judicial decisions, have discounted IQ scores altogether, holding that scores that are consistently higher than the standard range do not "dictate a finding" of no mental retardation. *People v. Superior Court*, 155 P.3d 259, 260 (Ca. 2007) ("The legal definition of mental retardation for purposes of *Atkins* . . . does not incorporate a fixed requirement of a particular test score."); *see also Pruitt*, 834 N.E.2d at 106 ("IQ tests are only evidence"; courts may consider IQ scores "together with other evidence of mental capacity").

### 2. Disparate Interpretations of Deficits in Adaptive Behavior Result in Inconsistent, Unconstitutional Decisions

Similarly, courts engage in a wide variety of disparate interpretations of limitations in adaptive behavior, the second criterion for mental retardation. Some courts, like the Tennessee courts in this case, engage in a strict checklist approach and categorize the adaptive behavioral skills narrowly. But other courts correctly recognize that the adaptive behavior criterion should not be interpreted rigidly, but rather flexibly, and informed by the purpose of the criterion.[8] *See generally Nelson*, 419 F.Supp.2d at 895; *Miller*, 888 A.2d at 631; *Pruitt*, 834 N.E. 2d at 109-110; Kan. Stat. Ann. § 21-4623 & § 76-12b01 (1995) (defining adaptive behavior as the effectiveness of personal independence and social responsibility expected of that

[8] Adaptive behavior is the "collection of conceptual, social, and practical skills that have been learned by people in order to function in their everyday lives." AAMR, 2002, at 41. The main purpose of this criterion is to ascertain a mentally retarded individual's need for services and supports. Thus, for forensic purposes, the individual who has existing deficits (or "limitations" in the AAMR jargon) in the performance of either conceptual, social, or practical skills meets the second criterion for mental retardation. *Id.* at 73 & 81.

person's age, cultural group and community). The upshot is that the Eighth Amendment takes on very different meanings depending on the states' commitment to upholding *Atkins*.

For example, the Tennessee statute provides only generally that a finding of mental retardation requires a finding of "deficits in adaptive behavior," Pet. App. 111. Although all of the experts testified that Petitioner suffered from deficits in adaptive behavior, and the trial judge found "overwhelming proof that Petitioner suffers from deficits in the area of communication" (a skills area included in conceptual skills under the 2002 definition), he concluded that Petitioner was not mentally retarded.[9] This erroneous conclusion flies in the face of the scientific community's recognition that the clinical definitions all define the same group. *See Nelson*, 419 F.Supp.2d at 895 ("[a]ll expert testimony . . . reflected that the definitions are consistent" and "essentially congruent"); *Miller*, 888 A.2d at 155. When courts interpret terms within the definition inconsistent with the scientific community's explanations, the result is the execution of the mentally retarded in violation of the Eighth Amendment.

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[9] By relying on the 1992 definition, which requires deficits in two or more of ten areas, American Association of Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Support* (9th ed. 1992) at 7 (hereafter AAMR, 1992), rather than the 2002 definition, which requires deficits in one of three more broad areas, AAMR, 2002, at 73, the court held that Petitioner was not mentally retarded, notwithstanding the experts' unanimous opinions that Petitioner suffered from deficits in six skill areas under the 1992 AAMR definition and in all three areas under the 2002 definition. Pet. App. 33, 89-90, 103.

### 3. Disparate Interpretations of Age of Onset Requirement Result in Inconsistent, Unconstitutional Decisions

Just as the scientific community has warned about strict adherence to a fixed IQ score, so too has it cautioned about rigid adherence to an inflexible age of onset requirement, the third criterion of the definition.[10] Since "[a]lmost every person with the requisite level of intellectual impairment and adaptive behavior deficit has had the disability since birth or childhood," Brief of Amici Curiae, AAMR, the ARC of the United States and the ARC of Arizona, *State v. Arellano*, No. CV-05-0397-SA (Ariz. 2006) at 17, the age of onset requirement is not essential to the definition. Consequently, rigid adherence to an age cutoff will result in the execution of mentally retarded defendants, as will occur in the case at bar.[11]

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[10] *See* Richard J. Bonnie, *The American Psychiatric Association's Resource Document on Mental Retardation and Capital Sentencing: Implementing* Atkins v. Virginia, 32 J. Am. Acad. Psychiatry Law 304, 306 (2004); Ellis, at 12-13 n.29 ("[I]f there were a capital prosecution of an individual who met the definition of mental retardation *except for the age of onset*, principles of equality likely would require comparable exemption from capital punishment.").

[11] Because of Petitioner's upbringing, he did not have social, medical, and educational documentation often relied upon to prove onset. He offered historical evidence of the circumstances of his mother's pregnancy, his birth, and his childhood, recognized by the mental health profession as indicative of childhood onset. Craig Haney, *The Social Context of Capital Murder: Social Histories and the Role of Mitigation*, 35 Santa Clara L. Rev. 547, 580 (1995) (the nexus between poverty, childhood abuse, and neglect is "so tight as to constitute a 'social historical profile' " of mental retardation). The court discounted the evidence as not being "real proof" placing a premium on the kind of documentation that Petitioner's upbringing made it impossible for him to produce. Specifically, the trial court noted that "onset before the age of eighteen may be demonstrated in a variety of ways, school records, medical records, documented social history, and observations and testimony of the evaluation experts. In this case there are no[records], very little documented social history and the observations of the experts

(Continued on following page)

Some states have adhered to the profession's guidance by requiring onset during the developmental period, but not mandating a specific age of onset. *See e.g.,* Col. Rev. Stat. § 18-1.3-1101 (2006); Conn. Gen. Stat. § 53a-46a (2006); Ga. Code Ann. § 17-7-131(a)(3) (2004); Ky. Rev. Stat. § 532.130(2) (1999); other states have deleted an onset requirement altogether, Neb. Rev. Stat. § 28-105.01 (2006 Supp.); N.M. Stat. Ann. § 31-20A-2.1(A) (2000 Repl.); and still other states have set the age of onset beyond age eighteen. Ind. Code § 35-36-9-2 (1998) (manifests "before becoming 22 years of age"); Md. Code Ann. Crim. L. § 2-202 (2002) (onset "before the age of 22"). Yet the vast majority of states continue to require onset by age eighteen despite the profession's advice. *See e.g.*, Ariz. Rev. Stat. Ann. § 13-703.02 (2006); Ark. Code Ann. § 5-4-618 (2006 Repl.); Fla. Stat. Ann. § 921.137 (2006); Kan. Stat. Ann. § 21-4623(e) (referencing § 76-12b01) (1995); Mo. Rev. Stat. Ann. § 565.030(6) (2007 Supp.); Tenn. Code Ann. § 39-13-203(a)(3) (2006 Repl.).

Petitioner Heck Van Tran's case stands as a glaring example of the arbitrariness and disparity which the state-court implementation of *Atkins* has produced and as such, is an appropriate medium for this Court's intervention. Because Petitioner was sentenced in Tennessee, where the trial and appellate courts misapplied the definition of mental retardation, he was sentenced to death. Had he been sentenced in California, Indiana, Kansas, Maryland, New York, or by the federal government, he would not suffer a sentence of death. Because Petitioner was sentenced in Tennessee, where courts follow a bright-line age of onset requirement, he was sentenced to death. Had he been sentenced in many other

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are speculative at best." Pet. App. 107. The trial court ignored the existence of achievement tests and his mother's testimony that Petitioner suffered from high fevers and seizures as an infant and did not speak until age six, a fact that all experts agreed was significant in indicating cognitive impairment in early childhood.

states (Colorado, Connecticut, Georgia, Indiana, Maryland, Nebraska, New Mexico, New York), he would not suffer a sentence of death.

Because Petitioner's Tennessee death sentence was before and not after *Atkins*, a judge validated his sentence of death. In California, Cal. Penal Code § 1376 (2007 Supp.); Louisiana, La. Code Crim. Proc. Ann. art. 905.5.1(c) (2007 Supp.); Maryland, Md. Code. Ann. Crim. L. § 2-202 (2002); Missouri, Mo. Rev. Stat. Ann. § 565.030 (4)(1) (2007 Supp.); New Jersey, *State v. Jimenez*, 908 A.2d 18 (N.J. 2006); Oklahoma, *Murphy v. State,* 54 P.3d 556 (Okla. Crim. App. 2002); and Virginia, Va. Code Ann. § 19.2-264.3:1.1 (2004 Repl.), Petitioner would have had the right to have a jury consider his mental retardation. Similarly, because he was sentenced in Tennessee for a pre-*Atkins* crime, Petitioner had the burden of proving his mental retardation by a preponderance of the evidence. Pet. App. 112. In Nebraska, New Mexico, and perhaps, Arkansas, his IQ scores would have created a presumption of his mental retardation, which the state would have been required to rebut. Pet. App. 112.

Although this Court declined in *Atkins* to adopt a uniform definition of mental retardation, this Court recognized an Eighth Amendment bar to the execution of the mentally retarded. The result of the variety of definitions and inconsistent judicial interpretations is quite simply this: individuals who are mentally retarded and protected from execution in one state remain in line for lethal injection in another. The ultimate consequence of such disparity is the very arbitrary system of capital punishment that this Court condemned in *Furman v. Georgia*, 408 U.S. 238 (1972).

States must not be allowed to circumvent the Eighth Amendment's narrowing requirement by adopting varying definitions of mental retardation and inconsistently interpreting those definitions. To remove the inconsistent and arbitrary imposition of capital punishment

that has resulted from the states' unsuccessful attempts to apply *Atkins,* this Court should grant certiorari and require states to apply current clinical definitions of mental retardation and to interpret those definitions consistent with the guidelines provided by the scientific community.

## II. The states violate due process of law by using factfinding procedures to evaluate a defendant's mental retardation that produce unreliable and inconsistent results and that cannot be reconciled with a reasonable interpretation of *Atkins v. Virginia.*

### A. Due Process of Law Requires Reliable Factfinding Procedures

The trend of many courts, including Tennessee's, to disregard unanimous, unchallenged scientific evidence establishing a defendant's mental retardation in favor of the court's own subjective interpretation of the defendant's background and the facts underlying the crime violates due process and equal protection of law. In this case, as well as many others, the court substituted its own subjective interpretation of the Petitioner's multicultural background, his poverty, his incarceration, his mental illness, and the facts of his crime in place of testimony by medical experts who unanimously agreed that Petitioner was mentally retarded.[12] Pet. App. 52, 55, 56, 90, 98-101, 106.

"[T]he Eighth Amendment has been recognized to affect significantly both the procedural and substantive aspects of the death penalty." *Ford*, 477 U.S. at 411.

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[12] Three board-certified experts concluded after thorough evaluations that Petitioner was mentally retarded under the Tennessee statute, the AAMR and the APA (DSM IV) definitions, and under *Atkins*. The State presented no evidence whatsoever, nor did it discredit Petitioner's experts. Pet. App. 11, 22, 52, 80.

Protecting the due process rights of a criminal defendant facing the possibility of capital punishment is particularly important because "execution is the most irremediable and unfathomable of penalties." *Id.* at 411. Because a death sentence is qualitatively different from any other punishment, it must be accompanied by "unique safeguards" to ensure reliability in its imposition. *Spaziano v. Florida*, 468 U.S. 447, 468 (1984).

Accordingly "[i]n capital proceedings, generally, [this] Court has demanded that factfinding procedures aspire to a heightened standard of reliability." *Atkins,* 536 U.S. at 317. Moreover, in the case of a mentally retarded defendant who is at a greater risk of wrongful execution, *id.* at 321 ("mentally retarded individuals in the aggregate face a special risk of wrongful execution" because "some characteristics of mental retardation undermine the strength of the procedural protections that [this Court's] capital jurisprudence steadfastly guards") the need for reliability is at a premium. *Id.* at 317. Just as factfinding relevant to a defendant's insanity, raised in a death penalty case, demands strict standards "with the high regard for truth," *Panetti,* at *15-16 (2007) (quoting *Ford,* 477 U.S. at 411), so does factfinding relative to a defendant's claim of mental retardation.

While this Court has avoided defining the precise parameters of due process, it has emphasized, particularly in capital cases, that state procedures must be conducive to producing a reliable result. Thus, very recently, this Court remanded a capital case based on a challenge to certain procedures used to determine competency for execution. *Id.* The Court found that the procedures, including one that allowed insufficient consideration of expert testimony, were so "deficient" as to be irreconcilable with any reasonable interpretation of the rule that they were intended to implement. *Id.* at *7.

This Court did not remand *Panetti* to comply with some abstract notion of the form of due process, but rather to satisfy its heart – fairness and reliability. *Id.* (citing *Ford,* 477 U.S. at 424) (noting that certain procedures invite "arbitrariness and error"). Relief was warranted because the procedures used by the Texas courts "were not adequate for reaching reasonably correct results" or, at a minimum, resulted in a process that was "seriously inadequate for the ascertainment of the truth." *Panetti,* at *21.

Since *Atkins*, courts have utilized factfinding procedures that undermine reliability in the mental retardation determination. Around the country, courts are engaging in fundamentally flawed factfinding procedures that render *Atkins* substantive guarantee totally meaningless. Courts are frequently disregarding expert opinions on the scientific issue in favor of their own subjective opinions about how the circumstances of the offense or the background of the offender might affect the mental retardation diagnosis. This, at best, unusual and, at worst, unconstitutional method of factfinding – unconfronted testimony from the bench – has become a common conduit for state courts to find an absence of mental retardation despite uncontested expert opinion to the contrary.

### 1. Flawed Factfinding Based on Subjective Interpretations of Facts of the Offense Violates Due Process of Law

The most problematic trend involves state courts subjectively interpreting the facts of the offense, or of other offenses, to refute a diagnosis of mental retardation. Certainly the complexity of some offenses might affect an expert's diagnosis, but courts are concluding without expert opinion or legislative mandate, for example, that being "extensively involved in criminal behavior" or having the "ability to repeatedly engage in illegal behavior" refutes proof of mental retardation, *Clemons v. State*, 2003 WL 2247260, *4 (Ala. Crim. App. 2003). The courts of

several states, including Tennessee,[13] Georgia,[14] Texas,[15] and Alabama,[16] have consistently focused on the facts of the crime to refute expert opinion. One court, against expert guidance, has developed its own questions to address before making a finding of mental retardation, including whether "the commission of the offense require[d] forethought, planning and complex execution of purpose."[17]

Perhaps the most extreme example of this arbitrary judicial factfinding occurred in the case at bar, wherein the appellate court concluded that "[t]he circumstances of Petitioner's crime belie any assertion that the Petitioner suffered from any deficit in intellectual ability or adaptive skills." Pet. App. 51. Despite the uncontroverted proof to the contrary, the appellate court substituted its own

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[13] Pet. App. 52 (defendant had not proved mental retardation because, among other things, he knew the layout of the restaurant, "did the talking," "went into the office to collect the jewelry," escaped, and sold and divided the proceeds).

[14] *Morrison v. State*, 583 S.E.2d 873, 876 (Ga. 2003), *cert. denied, Morrison v. Georgia*, 541 U.S. 940 (2004) (actions in robbing house and supplying alias to police used to refute expert testimony that defendant had adaptive behavior deficits).

[15] *Clark v. Quarterman*, 457 F.3d 441, 446-48 (5th Cir. 2006) (removing gun stock, purchasing of ammunition, and practice shooting used to refute expert testimony that defendant had deficits in adaptive behavior).

[16] *Ex parte Smith*, 2003 WL 1145475, *10 (Ala. Mar. 14, 2003) (no adaptive deficits because defendant gave alias to police and helped accomplice hide gun); *Clemons*, 2003 WL 22047260 at *4 (no mental retardation because, among other factors, defendant was "extensively involved in criminal activity, [and] post-crime craftiness"). *See also Yeomans v. State*, 898 So.2d 878, 902 (Ala. Crim. App. 2004), *cert. denied, Yeomans v. Alabama*, 126 S.Ct. 175 (2005) (no deficits in adaptive behavior because defendant "was steadily employed, ... married more than once, fathered and raised several children and, ... tried to teach his children right from wrong.")

[17] *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004).

subjective interpretation of the facts of the crime as means of avoiding the only conclusion supported by the scientific evidence – that Petitioner was mentally retarded. The appellate court dispensed with the diagnostic criteria altogether:

> [T]he court must not become so entangled in the opinions of psychiatric experts that we lose sight of the nature of the criminal offense itself. *We must not turn a blind eye to the defendant's ability to use society to better his needs. There are mentally retarded persons who are criminals, but they tend to commit fairly primitive crimes, impulsive crimes, and sudden acts of violence. The more complex the crime, however, the less likely that the person is mentally retarded.*

Pet. App. 52 (emphasis added).

Far too few courts have noted that this reasoning – a person who can plan and commit a crime cannot be mentally retarded – is irrational, arbitrary, and undermines the dictates of *Atkins*. As a federal court explained, holdings that utilize the facts of the crime to refute expert opinions as to mental retardation "may be a circular evasion of the *Atkins* majority opinion. . . . Neither *Atkins* nor [other precedent] suggest that [heinous] crimes render a defendant ineligible for exemption from the death penalty based on mental retardation." *Holladay v. Campbell*, 463 F.Supp.2d 1324, 1346 (N.D. Ala. 2006). With similar sentiment, a state appellate court twice reversed and remanded a capital case based on the introduction of irrelevant facts of the defendant's crime in the hearing to determine mental retardation. *Lambert v. State*, 71 P.3d 30, 31 (Okla. Crim. App. 2003); *Lambert v. State*, 126 P.3d 646 (Okla. Crim. App. 2005). As other petitioners before this Court have noted, lower courts are reflecting their intention "to overpower all evidence of mental retardation with the description of the crime and victim." Petition for Certiorari, *Hall v. State,* 2005 WL 1387964 (2005).

When courts override expert proof of mental retardation and conclude that a defendant is not mentally retarded, based on subjective interpretations of the facts of the crime, their conclusions are inconsistent with the scientific community's opinion on the matter, and thus, inherently unreliable. Recent research "demonstrates that such behavior may be an adaptation judged by others to be undesirable, often representing a response to environmental conditions and, in some cases, a lack of alternative communication skills." AAMR, 2002, at 79. Thus, a court's view that the ability to commit a crime indicates an adaptation to an environment and negates a finding of mental retardation directly conflicts with the scientific community's research that the ability to commit a crime actually indicates a maladaptation. Hence, a trial judge's subjective interpretation that the "facts of the crime belie mental retardation" is wholly rebuffed by contrary scientific evidence.

### 2. Flawed Factfinding Based on Subjective Interpretations of an Offender's Background Violates Due Process of Law

A second significant trend involves courts subjectively interpreting evidence of an offender's background in order to refute expert opinion as to mental retardation. With regard to an offender's background, for example, courts routinely use the facts that the defendant could drive,[18] marry,[19] procreate,[20] maintain relationships,[21] work,[22] or

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[18] *Clark*, 457 F.3d at 446-48 (defendant "was able to both drive a car and follow the speed limits of the [mobile home] park"); *Clemons*, 2003 WL 22047260, *4 (defendant "was a delivery driver for Domino's pizza . . . [which] requires . . . a valid driver's license").

[19] *Yeomans*, 898 So.2d at 902 (defendant "married more than once").

[20] *Id.* (defendant "fathered and raised several children").

count[23] as a basis for concluding that, despite scientific evidence to the contrary, the defendant was not mentally retarded. This reliance on an individual's strengths to rebut an expert opinion of mental retardation is in direct contradiction to an assumption implicit in the definition of mental retardation.[24]

> [P]eople with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation [but these] do not preclude a diagnosis of mental retardation if all of the requirements of the definition are satisfied [even if] such strengths do not reflect common stereotypes among non-experts of what a person with mental retardation can do.

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[21] *Clark*, 457 F.3d at 446-48 (defendant socialized and followed the rules of the trailer park); *Stallworth v. State*, 868 So.2d 1128, 1182-83 (Ala. Crim. App. 2001), *cert. denied*, *Stallworth v. Alabama*, 540 U.S. 1057 (2003) (defendant "had a long-term relationship and is [a] father").

[22] *McGowan v. State*, 2003 WL 22928607 (Ala. Crim. App. 2003) (defendant "maintained construction jobs"); *Stallworth*, 868 So.2d at 1182-83 (defendant "maintained a job for most of his adult life; worked as a cook, a brick mason, and a landscaper").

[23] *Clemons*, 2003 WL 22047260 at *4 (defendant, a pizza delivery man, "was expected to make change out of the 'bank' that was provided").

[24] Among the assumptions, reemphasized by the 2002 revision, is that "[w]ithin an individual, limitations often coexist with strengths." AAMR, 2002, at 1. By requiring limitations in only one of the three domains, the definition recognizes that "adaptive skill limitations often coexist with strengths in other adaptive skill areas." *Id.* at 41. The "presence of a strength in a particular [skill] area does not negate the coexistence of a limitation in another area of sufficient significance to establish the adaptive behavior component of the mental retardation definition." Peggy M. Tobolowsky, at 97.

AAMR, 2002, at 8. As one federal judge has noted, "[i]t is important, in determining whether a person is . . . mentally retarded, not to pick and choose so as to overemphasize certain characteristics." *Holladay*, 463 F.Supp.2d at 1343. Yet that is exactly what courts are doing, resulting in findings that reflect a stereotypical view that mentally retarded individuals must be "utterly incapable of caring for themselves. . . ." Human Rights Watch, *Beyond Reason: Mental Retardation: An Overview,* n.21 (2001) (viewed at hrw.org/reports/2001/ustat/ustat0301-01.htm).

In addition to overemphasizing an offender's strengths, some courts, including the Tennessee courts, are utilizing demographic facts, including a defendant's cultural, social, medical, and economic background, to justify ruling inconsistent with unanimous expert opinion. All of the experts in Petitioner's case unanimously agreed that Petitioner was mentally retarded. They based their scientific opinions on reliable scientific methods of determining mental retardation, including conducting interviews, reviewing records, and administering the "gold standard" tests.[25] The state presented no contradictory scientific evidence. Pet. App. 80.

Despite the overwhelming proof, the trial judge "discounted" the unanimous expert opinions giving "little credit" and "little weight" to the results of the standardized tests used to measure adaptive deficits, because of the

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[25] The experts utilized the WAIS-R, the WAIS-III, and the C-TONI, a nonverbal test used to confirm the validity of the WAIS-III results, for IQ testing. They used the Vineland Adaptive Behavior Scale, the Kaufman Functional Academic Skills Test, the Independent Living Scale, the Halstead Reitan Battery, and the Boston Diagnostic Aphasia Exam. *See generally* Esther Strauss, Elisabeth M.S. Sherman, Otfried Spreen, *A Compendium of Neuropsychological Tests: Administration, Norms, and Commentary* (3d ed. 2006) 164, 268, 279, 283, 425, & 892; *see also* Sara S. Sparrow & Dominic V. Cicchetti, *Diagnostic Uses of the Vineland Adaptive Behavior Scales,* 10 Journal of Pediatric Psychology 215, 218 (1985).

"unique circumstances of the Petitioner's background": his "upbringing in Vietnam," his restrictive incarceration on death row, his "limited grasp of the English language," and "his mother's potential mental retardation." Pet. App. 97-99. Because the Petitioner grew up on the streets of Vietnam, was not fluent in English, and had been incarcerated for more than ten years, the test results were disregarded. Pet. App. 97-101. Similarly, the appellate court, without any supporting evidence, commented that Petitioner's background "cloud[ed] the picture" and his "drug use and mental illness [] further skew[ed] the determination of mental retardation." Pet. App. 55.[26]

The ramifications of such reasoning are apparent. If only those individuals who speak only English, are not incarcerated, and do not suffer from co-existing mental illnesses are entitled to *Atkins* protection, then the protection for mentally retarded defendants is tenuous at best. As one federal court put it, "in theory, [the defendant] or someone similarly situated, can never convincingly satisfy his burden of proof [because] only fluent English speakers can qualify for the test that may ultimately prove that they are entitled to the *Atkins* shield." *Rivera v. Dretke*, 2006 WL 870927 (S.D. Texas 2006).

The Eighth Amendment's prohibition against execution of the mentally retarded is violated when states impose standards that will result in their execution, simply because English is not their first language in violation of equal protection of the law or because the scientific community has not yet normed tests for their populations.[27] If state courts are allowed to discount the

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[26] The Tennessee courts engaged in this speculation even though the experts used nonverbal tests to validate results and applied clinical judgment as necessary to account for Petitioner's background and incarceration.

[27] Properly trained mental health professionals must exercise clinical judgment when, inter alia, an "individual comes from a cultural and/or linguistic background that differs significantly from the mainstream,"

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validity of tests given to multicultural individuals who speak English as a second language, they will deny a large segment of mentally retarded defendants the protection required by the Eighth and Fourteenth Amendments. This argument applies with equal force to mentally retarded defendants who are incarcerated. If the only defendants who can prove their mental retardation are those that are living free in society, the Eighth Amendment's protection will be meaningless to the many mentally retarded defendants currently on death row.

Due process does not necessarily require a court to agree with expert opinion, but it does require consideration of expert opinion for factual findings "in a field [in which] the opinions of physicians, psychologists, and other experts will bear upon the proper analysis." *Panetti,* at *29. No one would seriously question that accurate, professional assessment of mental retardation is essential to the fair determination of mental retardation. Moreover, most would also agree that members of the legal profession are ill-equipped to make that assessment on their own. *Id.* at *9-10 (Thomas, J., dissenting); *see Ake v. Oklahoma*, 470 U.S. 68 (1985) (stressing importance of expert opinion on insanity; "where permitted by evidentiary rules psychiatrists can translate a medical diagnosis into language that will assist the trier of fact").

The protections of due process must require that trial courts give due deference to scientifically valid expert opinions on issues requiring scientific expertise. The premium that due process in a capital case places on reliability is trampled when courts replace uncontradicted expert opinion with irrelevant and subjective factual findings made from the bench. When the only evidence in

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when "earlier information is lacking or incomplete," when "difficulties arise in selecting informants or validating informant observations," and when "direct observation of the individual's actual performance has been limited. . . ." AAMR, 2002, at 94.

the record is the unanimous, uncontroverted opinion of multiple experts that a defendant suffers from mental retardation, a trial or appellate court violates due process when it disregards that scientific opinion in favor of their own speculative interpretations of the facts.

Just as Petitioner's case is an ideal medium for this Court to harmonize the states' definitions and interpretations of mental retardation, so too is it an appropriate vehicle for this Court to halt state court factfinding that undermines reliability and violates due process.

## III. The failure of some states, including Tennessee, to require that a jury determine whether a capital defendant is mentally retarded, beyond a reasonable doubt, before the defendant may be sentenced to death violates the Sixth Amendment and the principles of *Apprendi v. New Jersey* and *Ring v. Arizona*.

This Court should grant certiorari to clarify that states must require a jury to determine mental retardation in accord with the Sixth Amendment's requirements as proscribed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002). In Tennessee, and many states, once a defendant raises mental retardation as a substantive bar to execution, the death penalty may not be imposed absent a factual determination that the defendant is not mentally retarded. That fact is an essential prerequisite to the imposition of a sentence of death. Likewise, that factual determination, which is required before a defendant's sentence can be increased from life imprisonment to death, is made by a judge sitting alone as the sole arbiter of the facts.

This Court has explained the role that the Sixth Amendment plays in factual determinations. Any increase in a defendant's authorized punishment that is contingent upon a finding of fact must be found by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 482-83. The Sixth

Amendment does not depend on the "empty formalism" of how a state characterizes the elements of the offense or its sentencing procedures. Instead, it demands that facts "essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." *Ring v. Arizona*, 536 U.S. at 610 (Scalia, J., concurring).

As this Court held in *Ring v. Arizona*, *Apprendi's* rule applies to the "factfinding necessary to put [a defendant] to death." *Id.* at 609. There, this Court applied *Apprendi's* nomenclature of an "element of a crime" to aggravating factors in a death penalty case. *Id.* at 586. The aggravating factors were equivalent to elements of a crime because absent the finding of an aggravating factor (under Arizona law), no death sentence could be imposed. Thus, the definition of an "element" is functional: any fact that performs the function of allowing a sentence that otherwise would be unconstitutional is an *Apprendi* fact which must be found by a jury.

If a capital defendant raises mental retardation as a bar to the imposition of the death penalty, the imposition is contingent upon a factual finding that defendant is not mentally retarded. The fact that allows the defendant to be executed is the absence of mental retardation, no less than the fact that allows an Arizona defendant to be sentenced to death is the presence of some aggravating factor under Arizona law. Just as the finding of an aggravating circumstance opens the death chamber door, so too does the finding that a defendant is not mentally retarded. Both are the functional equivalent of an element of a crime; both must be determined with a "high regard for [the] truth." *Ford,* 477 U.S. at 411-12 ("[i]f the Constitution renders the fact or timing of . . . execution contingent upon establishment of a further fact, then that fact must be determined with the high regard for the truth that befits a decision affecting the life or death of a human being"). Both must also be found to exist by a jury beyond

a reasonable doubt. *Contra Howell*, 151 S.W.3d at 450 (2004); *see e.g. contra United States v. Webster,* 393 F.3d 787, 792 (5th Cir. 2004); *State v. Williams,* 831 So.2d 835, 860 (La. 2002); *Russell v. State*, 849 So.2d 95, 146-48 (Miss. 2003).

For pre-*Atkins* defendants, like Petitioner in Tennessee, the factfinding essential to a death sentence is made by a judge as required by Tennessee statute. Pet. App. 111-12. The Tennessee statute requires a defendant to prove mental retardation by a preponderance of the evidence. Because a judge, not a jury, made this factual determination in Petitioner's case and because the burden of proof was placed on Petitioner thus requiring Petitioner to prove the facts essential to avoid an enhanced sentence of death, his Sixth Amendment rights were violated.

## CONCLUSION

This Court should grant the Petition for Writ of Certiorari in this case to resolve the numerous conflicts that have arisen in the aftermath of *Atkins v. Virginia.* Action by this Court is necessary to ensure that the substantive restriction that the Constitution places on the states' power to take the life of a mentally retarded defendant is not circumvented by inconsistent, arbitrary, and unfair state court decisions.

Respectfully submitted,

PENNY J. WHITE
BROCK MEHLER

*Attorneys for Petitioner*

IN THE COURT OF CRIMINAL
APPEALS OF TENNESSEE
AT JACKSON
May 2, 2006 Session

**HECK VAN TRAN v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal
Court for Shelby County
No. P-14409 John P. Colton, Jr., Judge**

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**No. W2005-01334-CCA-R3-PD –
Filed November 9, 2006**

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This matter is before this court following the Petitioner Heck Van Tran's motion to reopen his post-conviction petition for the limited purpose of determining whether the Petitioner is mentally retarded and thus ineligible for the death penalty. The lower court entered an order denying relief. The Petitioner appeals asserting that the proof established by a preponderance of the evidence that the Petitioner is mentally retarded renders his sentence of death unconstitutional. After a review of the record and the applicable law, we affirm the lower court's denial of relief.

**Tenn. R. App. P. 3 Appeal as of Right;
Judgment of the Circuit Court Affirmed**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and J.C. MCLIN, JJ., joined.

Brock Mehler, Nashville, Tennessee, and William D. Massey, Memphis, Tennessee, for the appellant, Heck Van Tran.

Paul G. Summers, Attorney General and Reporter; Michelle Chapman McIntire, Assistant Attorney General; William Gibbons, District Attorney General, and John Campbell, Assistant District Attorney General, for the appellee, State of Tennessee.

**Background**

In 1989, the Petitioner was convicted of three counts of felony murder and sentenced to death for his role in the killing of three people during a robbery at a Memphis restaurant. *State v. Van Tran,* 864 S.W.2d 465, 468 (Tenn. 1993). On appeal, the Tennessee Supreme Court affirmed all three of the murder convictions and one of the death sentences. *Id.* Finding that the evidence was insufficient to establish one of the aggravating circumstances relied upon by the State, the court remanded the two remaining death sentences for resentencing. *Id.* On remand, the Petitioner received two concurrent life sentences for these two convictions. *Id.*

On March 7, 1995, the Petitioner filed a petition for post-conviction relief, alleging in part that in light of his present mental incompetency it would be unconstitutional to carry out the death sentence. *See Van Tran v. State,* 6 S.W.3d 257, 261 (Tenn. 1999). The petition alleged that the Petitioner had been psychotic and treated with "antipsychotic, antidepressant and antiparkinson [sic] medication." *Id.* The petition further alleged that "numerous mental health professionals had diagnosed [the Petitioner] as suffering from chronic paranoid schizophrenia, a condition

from which remission is rare and which had a prognosis of unchanged or progressive deterioration." *Id.* Attached to the petition was an affidavit of the attending physician at Riverbend Maximum Security Institution in which the physician opined that the Petitioner was not competent to be executed. *Id.* Additionally, Dr. Andrew J. Adler evaluated the Petitioner and testified at a hearing that the Petitioner had a full scale I.Q. of 67 and that he had deficits in adaptive behavior that had manifested during the developmental period before the age of eighteen. *Van Tran v. State,* 66 S.W.3d 790, 793 (Tenn. 2001). Dr. Lynn Zager, a psychologist called as a witness by the State, testified that the Petitioner's I.Q. was actually 72 with a standard error measurement of plus or minus three, rather than 67 as testified by Dr. Adler. *Id.* at 793. Dr. Zager explained that Dr. Adler had made a clerical error in applying the conversion chart. *Id.* The trial court accredited Dr. Zager's testimony. *Id.* Relief was denied by the trial court, this court, and the Tennessee Supreme Court. *Van Tran,* 6 S.W.3d at 261.

In December 1999, Dr. Andrew Adler again tested the Petitioner determining that the Petitioner had a full-scale I.Q. of 65. *Van Tran,* 66 S.W.3d at 794. Relying upon this data, the Petitioner filed a motion to reopen his post-conviction petition on February 7, 2000. *Id.* The trial court issued a preliminary order denying the motion to reopen, and this Court denied the Petitioner's application for permission to appeal. *Id.* The Tennessee Supreme Court, however, granted application for permission to appeal. Our supreme court, in a matter of first impression, held that "the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution prohibit the execution of mentally retarded individuals because

such executions violate evolving standards of decency that mark the progress of a maturing society, are grossly disproportionate, and serve no valid penological purpose. . . ." *Van Tran,* 66 S.W.3d at 792. In accordance with this holding, the supreme court remanded this matter to the trial court for further proceedings.

**Post-Conviction Proceeding**

Dr. Daniel H. Grant, a psychologist licensed in the State of Georgia, testified that he specializes in the areas of pain management, that he is board certified as a neuropsychologist and forensic examiner, and that he is a board certified expert in traumatic stress. Dr. Grant's credentials established him as an expert in mental retardation and neuro-psychology. Dr. Grant evaluated the Petitioner on November 13 and 16, 2002. He explained that his examination consisted of the administration of numerous tests over a two-day period. In addition to these tests, Dr. Grant reviewed documents and affidavits, interviewed the Petitioner, and talked with some of the officers at the "Correctional Center."

Dr. Grant related that the statutory definition of mental retardation provides that mental retardation is "the significant sub-average intellectual functioning as evidenced by an I.Q. of 70, or below, deficits in adaptive behavior, and it has to be manifested during the developmental period or by the age of eighteen." He commented that psychologists rely upon a similar standard. Dr. Grant cited to the standard set forth in the Diagnostic and Statistical Manual of Mental Disorders, the DSM-IV, and the revised edition called TR, which provides that, for an individual to be classified mentally retarded, the

individual "would have to have an intellectual functioning with an I.Q. between 70, it could go up to 85, because they take into consideration the standard error of measurement of the instrument. . . . That he has to have significant subaverage adaptive behavior. And again, these criteria have to have been met by the age of eighteen, or the end of the developmental period." "Adaptive behavior" is defined by the DSM-IV by ten criteria contained in social skills, communication, work, leisure, home living, functional academics and use within the community. Dr. Grant explained that all ten criteria need not be met. Rather, a deficit in any two of the areas will satisfy the criteria for "significant deficits in adaptive behavior." Dr. Grant also related the standard on mental retardation established by the American Association on Mental Retardation. This standard defines mental retardation as "a disability characterized by significant limitations of both intellectual functioning and adaptive behavior and expressed in conceptual, social and practical adaptive skills." To meet this criteria, "the level of intelligence and the level of deficit adaptive behavior have to be two standard deviations below the norm, which is 100." Again, these deficits must occur during the developmental period and before the age of eighteen.

As a result of his evaluation of the Petitioner, Dr. Grant summarized that, in his clinical opinion, the Petitioner satisfied the criteria set forth in Tennessee Code Annotated section 39-13-203, "as having significant subaverage intellectual functioning, evidenced by the I.Q. of 70, or below." He added that the Petitioner had "deficits in adaptive behavior as defined by the American Association of Mental Retardation and the American Psychiatric Association. And both of those deficits manifested before

the age of eighteen." Specifically, Dr. Grant concluded that the Petitioner has an intelligence quotient of 70 or below. This assessment was made pursuant to the administration of the Weschler Adult Intelligence Scale, III Edition, after which the Petitioner was assessed as having a full scale I.Q. of 70. Dr. Grant mentioned that the Petitioner had a performance I.Q. of 76 and a verbal I.Q. of 70. He noted, however, that the "full scale is considered to be the most valid and most reliable of the three measures and the full scale should be considered as the score to be used." Dr. Grant added that his results were consistent with the results reached after administration of the same test by Dr. Adler. After Dr. Adler's administration of the Wechsler test, the Petitioner had received a verbal I.Q. of 67, a performance I.Q. of 68 and a full scale I.Q. of 65. Dr. Adler's administration of the test occurred prior to Dr. Grant's administration of the test. Dr. Grant concluded that this fact explained the higher score achieved by the Petitioner during his administration of the test. He noted that the Wechsler's Adult Intelligence Scale – Revised, was administered to the Petitioner in 1996. The results of this testing revealed a verbal I.Q. of 71, a performance I.Q. of 77 and a full scale I.Q. of 72. He noted that the full scale score of 72 was most likely inflated a full three points because of the age of the test.

In addition to the Wechsler test, Dr. Grant administered the Comprehensive Test of Nonverbal Intelligence, a test of intelligence not requiring language on the part of either the administer or the participant. Dr. Grant explained that this test is comprised of two sub-tests, one part pictorial non-verbal and one part geometric non-verbal. On the pictorial test, the Petitioner received an I.Q. score of 68. He received an I.Q. score of 72 on the

geometric non-verbal test. These two scores resulted in an overall I.Q. score of 68. Dr. Grant acknowledged that the Petitioner's consistent scores between 65 and 70 on all four occasions when testing was administered was significant in the fact that it "shows a strong validity, strong reliability, across the different instruments, as well as administration of the same instruments at different periods of time."

Other testimony was administered in order to evaluate the Petitioner's language and communication skills, including the Peabody picture vocabulary test. The Petitioner scored a 53 on this test, reflecting that the Petitioner has a "weakness, or a deficit in receptive, or hearing vocabulary." Dr. Grant described this deficit as "severe." Also administered was the expressive vocabulary test, on which the Petitioner scored "a status score of less than 40." Dr. Grant related that this "was the lowest score that the norms would go to and he was 40 or less than 40." Another test on oral written language skills, nicknamed the OWLS, was administered to determine the ability to comprehend the spoken word and to assess ability to comprehend the language. The Petitioner had a standard score of 68 on the sub-test, which, although being consistent with his level of intelligence, revealed a significant deficit. The oral expressive sub-test was also administered. The Petitioner scored a 62 on this sub-test. The composite score on these two sub-tests was a 63, "which means, his overall language ability for listening comprehension and oral expression over those two measures are the 63." This score indicates a significant deficit.

Dr. Grant admitted that the Petitioner's native language is Vietnamese and that the tests were administered in English. He explained that this was one reason

why he administered the Comprehensive Test of Nonverbal Intelligence, because it does not require a language on the part of the administer or the participant. Dr. Grant stated that the Petitioner's result on this test was consistent with the Petitioner's performance on the Wechsler test. Additionally, he stated that Dr. Wasserman interviewed the Petitioner and administered a measure of his use of his Vietnamese language and also of his ability to read in Vietnamese. This examination resulted in findings that the Petitioner is impaired in both English and Vietnamese, with the Petitioner being more impaired in Vietnamese than in English. The Petitioner's comprehension in Vietnamese was poor. Dr. Wasserman concluded that the Petitioner's English proficiency exceed the Vietnamese language proficiency and that she would therefore expect that he would score higher on tests that were administered in English than on tests that were administered in Vietnamese. Dr. Grant stated that the Petitioner's deficits in the Vietnamese language were that of a five-year-old and were two standard deviations below of what you would expect. Dr. Grant added that these deficits were consistent with the results from Dr. Adler's administration of the CELF, clinical evaluation of language fundamentals. On this test, the Petitioner had received a receptive language score of 50, an expressive language score of 50 and a total score of less than 50. Dr. Grant stated that the Petitioner's deficits in communication skills satisfied one of the two criteria needed by the classification system for retardation.

Regarding an assessment of the Petitioner's academic skills, Dr. Grant administered the Kaufman functional academic skills test. On this test, the Petitioner received an arithmetic standard score of 93, a reading standard

score of 66, and a functional academic score of 79. The Petitioner had a reading comprehension score of 4.1 and, on the wide range achievement test, he received a reading grade level of 3.1 with a standard score of 57. Dr. Grant continued that the Petitioner's spelling was at a 4.1 grade level and his math skills were at a 7.6 grade level. Dr. Grant placed little import as to the Petitioner's performance on the arithmetic testing, noting that all individuals, even mentally retarded individuals, have strengths and weaknesses and that mathematics was one of the Petitioner's areas of strength. Dr. Grant stated that the Petitioner's poor performance in spelling, reading, and reading comprehension were evidence of a significant deficit. In this regard, Dr. Grant noted that the Petitioner has been in a G.E.D. (general equivalency diploma) program classroom for eight to nine years and he is still scoring at a 4.1 grade level in reading. Dr. Grant stated that the Petitioner's "functional academic skills are significantly impaired," thus satisfying another of the criteria needed by the classification system for retardation.

Dr. Grant also administered the Independent Living Scales test designed to measure an individual's ability to live or function independently. On this test, the Petitioner received a score of 69. This score meets the criteria for having a significant deficit in adaptive behavior because it fell two standard deviations below the mean. The Petitioner was also subject to the Vineland adaptive behavior scale. This test was administered twice by Dr. Adler, revealing scores of 58 and 65. Dr. Grant stated that both of these measures meet criteria for the American Association of Mental Retardation as two standard deviations below the mean for adaptive behavior.

Dr. Grant concluded that based upon the tests administered to the Petitioner regarding his abilities, communication, language skills, and independent living that the Petitioner had significant deficits in adaptive behavior. He further concluded that these deficits manifested during the Petitioner's developmental period. To support this second conclusion, Dr. Grant based his decision upon a social history compiled by Mr. Dinh. This report revealed that the Petitioner did not speak until he was six years old, did not do well in school, failed to learn as other individuals in his English as a Second Language class in the Memphis school system, and had difficulty living independently. Dr. Grant added that his evaluation revealed that the Petitioner had never succeeded in living independently.

Dr. Grant testified that the Petitioner's social history also contained some identifiable "risk factors" for mental retardation. These factors included the fact that the Petitioner did not speak until he was six years old. Another factor is that he was not toilet-trained until he was five years old. Dr. Grant again stated that it was his opinion that the Petitioner is mentally retarded pursuant to the terms of the statute, the terms of the DSM-IV, and the standards of the American Association of Mental Retardation.

On cross-examination, Dr. Grant testified that the Petitioner came to the United States from Vietnam when he was sixteen or seventeen years old. Only after arriving in the United States did the Petitioner learn to speak and write English. Notwithstanding, Dr. Grant maintained that the Petitioner was more proficient in the English language than in his native Vietnamese. He added that

the Petitioner only attended school for two years while in Vietnam.

Dr. Grant agreed with the prosecutor that the Petitioner's living conditions in Vietnam were "down right horrible." The Petitioner and his mother lived "on the street," "basically, through black market, selling cigarettes and things." The Petitioner came to this country through a sponsorship by Catholic Charities. It was only a "few years" from the time of his arrival in this country, when he was seventeen, until he was incarcerated at age twenty. Dr. Grant failed to concede that the Petitioner's life history would have had a substantial impact on his failure to properly respond to lifestyle questions asked in correspondence to his evaluation.

Dr. Grant conceded that the W.A.I.S. – III test for I.Q. was potentially not an accurate test for persons of Asian ancestry. To compensate for any inaccuracies, Dr. Grant stated that he "gave the second measure to control for that. . . ." He added that there was no basis on which to believe that the Petitioner's I.Q. had "gone down over the years." Dr. Grant acknowledged that the Petitioner had been diagnosed a schizophrenic and that the cognitive ability of a person with schizophrenia will decrease over time. Dr. Grant maintained, however, that the Petitioner was "functioning essentially the same place he was functioning when he was administered those achievement tests at Sheffield High School." He added that it was not significant, in his opinion, that the Petitioner's performance I.Q. was six points higher than his overall I.Q. Dr. Grant noted that the Petitioner had significant neurological impairments. He stated that these existed prior to the onset of his schizophrenia. These neurological impairments impaired the Petitioner's ability to acquire

knowledge and language and also impaired his ability to adapt. Dr. Grant maintained that the Petitioner was at a sufficiently retarded level prior to the onset of his schizophrenia. It was also revealed that the Petitioner's mother has a low cognitive ability. This fact would not have impaired her ability to understand the questions contained in the Vineland assessment.

Dr. Grant further explained that it was possible for a mentally retarded individual to learn another language as accomplished by the Petitioner. He further stated that mentally retarded individuals could work, go to school, and achieve learning levels up to the sixth grade.

Dr. Pamela Auble, a psychologist with a specialty in neuropsychology, examined the Petitioner in November 2002. Her evaluation was comprised of some standardized testing administered to the Petitioner and of interviews with the Petitioner, as well as other persons whom had been involved with the Petitioner. The people other than the Petitioner included a correctional officer, three doctors, an attorney, and the Petitioner's mother. As a result of her evaluation, Dr. Auble found that the Petitioner "met the criteria for mental retardation. [She] also found evidence of neurological impairment as defined as deficits in other areas of functioning."

Dr. Auble related that the nationally accepted definition of mental retardation was contained in the DSM-IV. She explained that the DSM-IV's definition consisted of three prongs: "[o]ne, is significantly sub-average intellectual functioning as evidenced by an IQ of . . . approximately 70 or below. Second, deficits and adaptive behavior, which has a very specific meaning and looks at very specific areas. And, third, that it must be manifested by

age 18." Dr. Auble opined that this standard and the Tennessee standard are basically the same. She noted that the Tennessee statute states significantly sub-average intellectual functioning as evidenced by a functional I.Q. of 70 or below where the DSM-IV provides for an I.Q. of "approximately 70" and the AAMR definition provides "70 to 75." Notwithstanding these differences, Dr. Auble maintained that all three definitions are "all talking about an IQ, a true IQ that's two standard deviations below the means."

Dr. Auble stated that eighty-five percent of the persons who are mentally retarded fall in the range of mild mental retardation, an I.Q. in the range of fifty (50) to seventy (70). These persons attain some level of life and work skills, can hold a job, and may be able to obtain academic skills about to the sixth grade level. People in the lower levels, I.Q.s between forty-nine (49) and twenty (20), and classified as moderate, severe, or profound mental retardation, "mainly live in institutions or under very supervised settings." Dr. Auble commented that even those persons with mild mental retardation require some degree of "support services."

Dr. Auble proceeded to provide a definition of "adaptive behavior," the second prong for the diagnosis of mental retardation. She explained that the DSM-IV listed ten or eleven areas of functioning. These areas include communication, self-direction, functional academics, home living, social/interpersonal, self-care, use of community resources, work, leisure, health, and safety. To have a deficit in adaptive behavior, one must have deficits in at least two of the eleven areas of functioning. As Dr. Auble explained:

> The AAMR, Tenth Edition, defines adaptive functioning as deficits falling into at least one of three areas. One is practical, which is the ability to maintain yourself independently in terms of academics and work environment. The second is social, which involves gullibility, social understanding, the ability to avoid being a victim, taking responsibility, home skills. And the third is conceptual. An area which involves language, reading, writing, managing money, self-direction, and abilities in that order.

Dr. Auble stated that, under the AAMR definition, one needed one of these three areas to qualify for a diagnosis of mental retardation in the adaptive deficits prong. She explained that one need not have deficits in all of the areas. In this regard, Dr. Auble noted that, "like the rest of us," "people with mental retardation" "have strengths and weaknesses and may have deficits in some areas and relatively good functioning in other areas."

Dr. Auble further testified that she conducted neuropsychological testing and testing for different areas of functioning such as memory and mental flexibility, language, and also malingering. She "found that [the Petitioner] passed the malingering test." She stated that he did not appear to be faking and was "putting forth a good effort on the test procedures." The neuropsychological testing indicated impairments. Dr. Auble related that she administered the Halstead Reitan Battery, the most widely accepted neuropsychological test battery in the United States, which is a series of tests from which you obtain a global measure of how impaired he is over those multiple tests. The Petitioner's Halstead Impairment Index was .9. Dr. Auble explained that the scale ranges from zero to one, with the higher scores indicating more

impairment. Accordingly, the Petitioner's score of ".9 is close to as bad as it gets and is in the impaired range."

Identifying the particular impairments, Dr. Auble testified that the Petitioner had specific impairments in four areas. First, the Petitioner had deficits in tasks that measure frontal lobe functioning. Dr. Auble explained that frontal lobe functioning has to do with the "ability of a person to adapt to a new situation, to modify their behavior when things change, to switch from one idea to the next. It's a kind of mental flexibility." As a result of the Petitioner's performance on a variety of frontal lobe tests, Dr. Auble described him as "mentally rigid," "[o]nce he gets into an idea he has trouble changing that idea." To exemplify her statement, Dr. Auble stated that the Petitioner had trouble with tests that "involved him figuring out the meaning of a new word by giving him examples of that word in a different context."

Second, Dr. Auble concluded that the Petitioner had "evidence of deficits on testing of language and verbal communication." These results were consistent with results reached on other evaluations of the Petitioner. She explained that the Petitioner had difficulty naming common objects on the Boston Naming Test. Likewise, on the Boston Diagnostic Aphasia Exam, "he had trouble understanding" "pretty short" stories. Dr. Auble related that the Petitioner's performance on this test was "about average for someone who has an aphasia or a language disturbance." Another indication that the Petitioner had a language disturbance was the fact that the Petitioner had difficulty repeating what Dr. Auble had said.

The Petitioner's third area of impairment was on memory testing. Dr. Auble stated that the Petitioner's

"memory is particularly poor for information that he's told, for stories, for words." She further explained that the Wechsler Memory Scale is normed with the Wechsler Intelligence Scale, meaning that the person's memory skill corresponds with their intelligence level. She added that the Petitioner's memory "was significantly below what you would expect for someone who has an IQ of 65." Thus, the Petitioner has a deficit in his verbal memory that is lower than one would expect for someone of his level of intelligence.

The final area of impairment was on motor speed, which is a finger tapping test. Dr. Auble reported that the Petitioner was slow with both hands, both his right hand and with his left hand.

Dr. Auble remarked that identification of these areas of impairment is important in evaluating mental retardation because it reveals things that I.Q. does not measure. These impairments further indicate that the Petitioner has extensive deficits that are above and beyond what you would expect in somebody even with his I.Q. level. Dr. Auble continued that these impairments have an impact on the Petitioner's adaptive functioning and on his functional intelligence. In terms of mental retardation, Dr. Auble stated that there was evidence of neurological impairments prior to his attaining the age of eighteen.

In making her evaluations, Dr. Auble reviewed the three Wechsler Intelligence Tests, one administered by Dr. Adler in 1996, the second administered by Dr. Adler in 1999, and the third administered by Dr. Grant in 2002. She related that the Petitioner received a full scale I.Q. of 72 on the 1996 test. This score was received at the conclusion of a norming period of the test and immediately prior

to the Wechsler III test coming out. Dr. Auble related that this score was actually 2.9 points higher than it would have been had the Petitioner been administered the Wechsler III test. Accordingly, she related that the score of 72 was, in actuality, a score of 69 on the Wechsler III test. As to the remaining tests, the Petitioner received a full scale I.Q. of 65 on the 1999 test and a full scale I.Q. of 70 on the 2002 test. Dr. Auble also considered the Comprehensive Test of Non-verbal Intelligence conducted by Dr. Grant. The Petitioner received a non-verbal I.Q. score of 68 on this test. Dr. Auble concluded that all of these scores were consistent with one another.

Dr. Auble further added that the scores were not lowered in any way due to the fact that the tests were not normed on an Asian population. She explained that, although there are no Asian language versions of the Wechsler Intelligence Scale, there has been a study of the Wechsler Intelligence Scale for Children revised with Asian Americans which finds that the Wechsler Intelligence Scale for Children is valid in predicting academic achievement in Asian children. Moreover, in determining the validity of I.Q. testing, one can consider an individual's performance on a particular sub-part of the test which is "heavily loaded . . . in American culture." She noted that, while the Petitioner scored a 6 on this sub-part, which is below average, this score was higher than 11 of the 12 other sub-parts of the test, indicating that the Petitioner is not performing "less well on questions that have a heavy cultural loading." Another measure is the Comprehensive Test of Non-verbal Intelligence. She explained that this test was designed to be given to individuals who have different cultures and different history. Specifically, she noted that the Comprehensive Test of Non-verbal Intelligence "has

normative data for Asians." "The non-verbal IQ for the Asians was an 103. [The Petitioner's] score [was] 68." Finally, Dr. Auble noted that "in general, Asian Americans tend to score higher than Caucasians on tests of cognitive ability." In so stating, she referred to a study indicating that "Asian's in general have larger brains than Caucasians." In essence, the study relied upon by Dr. Auble indicated that any bias in the testing scores would favor Asians over Caucasians. Dr. Auble further testified that the Petitioner's primary language is English, not Vietnamese. She further explained that Dr. Wasserman, a doctor who previously evaluated the Petitioner, was fluent in both Vietnamese and English. Dr. Wasserman evaluated the Petitioner and determined that while the Petitioner's English was below expectations, his English was still better than his proficiency in Vietnamese. Indeed, Dr. Wasserman noted that the Petitioner "did not even know the complete Vietnamese alphabet."

When questioned as to the impact that the Petitioner's schizophrenia had upon his I.Q., Dr. Auble stated that, in her opinion, this fact did not lower the Petitioner's I.Q. This conclusion was based upon three facts. One, the Petitioner's symptoms of schizophrenia were relatively well-controlled. This fact means that he was able to focus attention on the test and, therefore, his schizophrenia did not effect his performance on the intelligence test. She recalled that the Petitioner put forth a "good effort and that he was attending to the task before him." Additionally, she added that there was longitudinal research indicating that deficits are present many years before schizophrenia ever develops. In stating this fact, Dr. Auble relied upon a study published in 1999 which indicated that I.Q. is generally lower in children who develop schizophrenia

years later. In other words, she summarized that the I.Q. does not decline; rather, it starts out low and ends low. Finally, Dr. Auble stated that, where treatment is initiated promptly upon diagnoses, then I.Q. scores do not decline and can, in fact, improve. From what Dr. Auble was able to ascertain from prison records, the Petitioner has been treated since his schizophrenia was diagnosed. The Petitioner was taking the prescription medication Haldol for his schizophrenia. Dr. Auble stated that without the Haldol the Petitioner, most likely, would not have been testable.

Regarding the second prong for finding mental retardation adaptive deficits, Dr. Auble explained that, in order to determine whether a person had adaptive deficits, a psychologist would use standardized scales obtained by having the person perform various tasks or through the report of other people. A psychologist would also use social history information. Finally, there are some specific tests designed to assess adaptive behavior. Dr. Auble stated that Dr. Grant and Dr. Adler administered the standardized tests to the Petitioner in this case. Dr. Auble related that the Petitioner's score on the Independent Living Scale, one of these specialized tests, was 69. She also reported that two Vineland tests were administered; one was filled out by the Petitioner's mother, and the other was completed by correctional officers at Riverbend. The overall score on the Vineland tests was 65. These scores placed the Petitioner in the impaired range, which is two standard deviations below the mean. Dr. Auble stated that, according to the AAMR and the DSM-IV, these tests scores were illustrative of adaptive deficits. Dr. Auble further stated that, in her opinion, the Petitioner "met five of the 10 or 11 areas of adaptive deficits from the DSM-IV list of criteria."

Specifically, the Petitioner exhibited clear deficits in his basic language skills and communication. He exhibited clear deficits in functional academics. In this regard, Dr. Auble stated that the Petitioner has been in a GED program since 1990, has yet to complete the class, and has not progressed. Dr. Auble also concluded that the Petitioner's conceptional reasoning and adaptive flexibility were impaired. A guard at the correctional facility described the Petitioner as "child like." Dr. Auble added that the Petitioner does well in the prison setting, which is highly structured and which does not require him to make decisions. Fourth, Dr. Auble stated that the Petitioner is impaired on the independent living scale sub-test measuring health and safety. On this test, the Petitioner's score was only 55. Fifth, in terms of social and interpersonal functioning, the Petitioner was characterized as gullible and as a follower.

Dr. Auble testified as to how the Petitioner's adaptive behavior fit within the three domains of the AAMR Tenth Edition. The first domain is conceptual encompassing things like language, reading skills, and writing skills. Dr. Auble related that the Petitioner shows impairment as to all of these skills. The Petitioner does not adapt to change, and he does not do well in complex situations that require him to alter his behavior. The Petitioner has trouble remembering. She added that he "tends to do what he is told." Dr. Auble stated that the Petitioner has never lived completely on his own.

When questioned as to the effect of the Petitioner's "street smarts," Dr. Auble stated that "street smarts" is slang and is not a scientific term with scientific standards. However, using a "slang dictionary," Dr. Auble defined "street smarts" as "cunning and clever particularly at

surviving in urban settings." Under this definition, Dr. Auble opined that there had not been any evidence of the Petitioner being cunning or clever in his life history. She explained that, from the Petitioner's early to late childhood, he lived on the streets with his mother. She stated that he "barely survived." Once in the United States and in school, the Petitioner learned English more slowly than others who had started with him. He left school after one year. The Petitioner began using alcohol and drugs on a daily basis. The Petitioner has never been able to maintain a stable living situation or to live completely independently. The Petitioner had conflicts with his mother. He lived with Carolyn Mitchell who encouraged him to leave because he was too dependent on her. He lived with several young men and with a girlfriend.

As to the third requirement under the AAMR, Dr. Auble stated that the evidence indicates that the impairments appeared during the Petitioner's developmental period. In this regard, she stated that the Petitioner's life history indicates a number of risk factors that would have contributed to his mental retardation. Using a table listing various potential risk factors for mental retardation provided in the Tenth Edition of the AAMR, Dr. Auble proceeded to enumerate those factors applicable to the Petitioner. First, the Petitioner's mother had poor prenatal care. The Petitioner's mother suffered from a fall while she was pregnant resulting in "some bleeding and some other injuries. . . . The Petitioner's mother "smoked about a half a pack a day at the time she was pregnant with him." The Petitioner's mother is "probably relatively limited in intelligence." The Petitioner did not have medical treatment while he lived in Vietnam. As a child, he had malnutrition and reportedly had seizures. The Petitioner had

traumatic brain injuries. The Petitioner also lacked adequate stimulation and experienced family poverty. His living situation was essentially homeless. During his childhood, he only attended school for two years. The Petitioner suffered child abuse and neglect. The Petitioner had no consistent caretakers or friends. His mother was a single parent, and the Petitioner did not really know his father. The Petitioner did not speak until he was six years old, and, when he did speak, his speech was abnormal. Presently, the Petitioner has speech impairments in both Vietnamese and English. The Petitioner was a poor student, although he did have good attendance. "These findings indicate that there was brain dysfunction that was present in childhood as well as present now." Dr. Auble summarized, " . . . he had an impaired mother. He had lack of support from his family. He had abuse, poverty, war, discrimination . . . , early drug and alcohol abuse. All of this contributed to his compromised functioning during childhood." She concluded that, in her opinion, the Petitioner is "mentally retarded under the definition of the Tennessee Statute, the AAMR and the DSM manual."

On cross-examination, Dr. Auble reaffirmed that the Petitioner first came to the United States when he was seventeen years old and could only speak Vietnamese. Once in the United States, the Petitioner was enrolled in a program that was designed to assimilate foreign born students into the system. The Petitioner remained in this program for one year. During this time, he did not take an I.Q. test. He was, however, "given achievement testing." On this testing, the Petitioner received a "grade of 'C' for social interaction. A 'B' for one period of bilingual studies, first semester. And all of those other classes were 'D.'" Although Dr. Auble stated that, in her opinion, the Petitioner was

not able to live independently, she conceded that the Petitioner "took care of [Ms. Mitchell] and her children" when he lived with her. In fact, the Petitioner did "some cooking" and helped her children get ready for school. Dr. Auble further conceded that the Petitioner has had "several jobs." In fact, the Petitioner's last place of employment was with Whittington Building Supplies. His job duties consisted of cleaning the yard and cutting wood to fixed lengths. Two days prior to the crime for which he is currently under a sentence of death, the Petitioner was promoted from an outside job to the same job inside the shop. The Petitioner was described as an "excellent employee" by his managers. Dr. Auble confirmed that the Petitioner had also been employed for a while at Jade East," the location of the crime, for a while. The Petitioner reported that he had been "fired from Jade East because he [made too many egg rolls]."

Again, Dr. Auble conceded that the Petitioner was not administered any type of evaluation until he was incarcerated and that this testing was at the request of the Petitioner's counsel. She stated that the first I.Q. test was administered to the Petitioner by Dr. Adler in 1996. The Petitioner received an I.Q. score of 72. Dr. Auble explained that this score was inflated, however, due to the "Flynn Effect," or re-norming of the test. Dr. Auble stated that the fact that a person has an I.Q. below 70 does not, by itself, render that person mentally retarded.

Dr. Auble stated that the Petitioner was first diagnosed with schizophrenia in August 1990 by Dr. Humble. Dr. Auble explained that, shortly after the Petitioner's arrival at Riverbend, "he started exhibiting very bizarre behavior." The Petitioner began taking medication on August 9, 1990. However, Dr. Auble conceded that the

Petitioner still experienced hallucinations in 1992. She affirmed that this may have been due to the Petitioner's refusal to take his medication. Throughout August 1993, the Petitioner still complained of hearing "auditor hallucinations," stating that the medication improved the hallucinations but did not eliminate them. Dr. Auble stated that the Petitioner was prescribed neuroleptic antipsychotic medication pretty consistently since 1990. He began taking Haldol, then took Prolixin, and for a time Thorazine. Dr. Auble stated that, although Haldol is one of the oldest neuroleptics, the Petitioner was probably still taking it because it was cheaper than the newer medications.

Based upon the proof presented at the evidentiary hearings, the Petitioner averred that he is mentally retarded within the meaning of Tennessee Code Annotated section 39-13-203, and asserted that his sentence of death should be modified to a sentence of life imprisonment.

## Proof Introduced at Prior Proceedings

### A. Trial

The material facts of the crimes committed by the Petitioner are set forth below as incorporated from our supreme court's decision on direct appeal:

> On the afternoon of October 20, 1987, Arthur Lee, Amy Lee, and Kai Yin Chuey were found dead in the Jade East Restaurant in Memphis. The restaurant had not yet opened for business that day, and the victims had apparently been inside making preparations for the evening. Jewelry with a wholesale value of $25,000.00 had been taken from the restaurant. The State's critical

proof included: a statement taken from the Defendant in which he admitted his involvement in the crimes; Defendant's fingerprint on one of the jewelry cases taken during the robbery; and the eyewitness identification of the Defendant by a survivor of the robbery.

. . .

The Defendant . . . was born on November 7, 1966. His mother was Vietnamese; and his father, an American serviceman, died in Vietnam in 1968. The Defendant started school when he was six years old but stopped when Saigon fell. In 1983 a Catholic relief agency resettled the Defendant and his mother in Memphis. The Defendant briefly attended school before dropping out in 1984.

After his arrest by the Houston, Texas, police, Defendant gave a statement in which he acknowledged his role in the robbery and murders. He stated that he had worked briefly at the Jade East Restaurant a month or two before the crimes and that Mr. Lee had fired him because "he didn't like me" and "said I cooked too many egg rolls." The Defendant implicated Hung Van Chung, Kong Chung Bounnam and Duc Phuoc Doan in the robbery. He stated that the four men entered the back door of the restaurant and he talked to Arthur Lee "for about ten minutes before there was any shooting." The Defendant had a .22 revolver, Bounnam a .44, Chung a .22 and Doan a .25.

. . . [A]fter the group pulled out their guns:

Mr. Lee grabbed Nam's [Bounnam's] hand with the gun and elbowed him in the chest. Nam fell back and hit the old lady. The old lady fell on me

and when she hit me it caused the gun to go off. I don't know what I hit that time. Mr. Lee then kicked Hung [Chung]/ I heard Hung Chung shoot one or two times and then Mr. Lee tried to grab the gun and Hung Chung shoot him. While Mr. Lee was trying to get Hung [Chung's] gun, I told him not to or I would have to hurt him. He turned and tried to get my gun and I shot him. He fell and was moving around and I shot him in the face somewhere. Then I walked thr[ough] the door where they kept the money and gold. I looked up and saw the old lady roll over. I thought she had something in her hand. I shot her in the back of the head.

While the Defendant was in the office collecting the jewelry, he heard more shots. He stated that he did not know "who was shooting or what" or who had shot "the young girl," Amy Lee. Upon leaving the office, the Defendant saw Bounnam holding Ging Sam Lee. The Defendant told Bounnam not to hurt her. Bounnam hit Mrs. Lee on the back of the head, and all the assailants left.

Outside the restaurant, the Defendant discovered that Bounnam had been shot in the left leg near the groin. Bounnam claimed that the Defendant had shot him. The group fled in Bounnam's Camaro to an acquaintance's apartment. From there, the Defendant, Bounnam and Chung drove Chung's car to Washington, D.C. Bounnam's Camaro was left in Memphis. Doan remained in Tennessee.

From Washington, the trio drove to Houston, Texas. Once in Houston, the Defendant went to the Saigon Pool Hall and talked with a Vietnamese man about selling some gold. The man took

> the gold and returned in about ten minutes with $4,000.00. The Defendant paid the man $200 and divided the rest three ways. Later, Bounnam flew to North Carolina and Chung went to Dallas with a friend.
>
> On April 28, 1988, almost six months after the robbery, the Defendant was arrested in Houston. . . .

2. Post-Conviction Proceeding

The Petitioner argued that he was mentally retarded in his original petition for post-conviction relief. At the evidentiary hearing on this petition, the Petitioner presented the testimony of Dr. Andrew Adler, a psychologist who administered psychological tests to the Petitioner. *See Heck Van Tran v. State,* No. 02C01-9803-CR-00078, 1999 WL 177560, *6 (Tenn. Crim. App., at Jackson, Apr. 1, 1999). Dr. Adler testified that the Petitioner's I.Q. was 67. Dr. Adler also concluded that the Petitioner suffered from paranoid schizophrenia, in addition to, post-traumatic stress disorder. However, the post-conviction court found that Dr. Adler misread the manual relating to I.Q. calculation. *Id.* Dr. Lynn Zager, a psychologist who testified for the State, related that the proper calculation was 72, not 67. *Id.*

Additionally, the proof established that the Petitioner's appointed trial counsel reported an initial difficulty in communicating with the Petitioner due to the language barrier. *Id.* at 8. However, once an interpreter was appointed, counsel reported that the Petitioner was able to understand. *Id.* Both counselors Quinn and Scarmoutsos reported that neither felt that competency was an issue. *Id.* Trial counsel retained the services of Dr.

Khanna, a clinical psychologist, prior to trial. *Id.* Dr. Khanna found the Petitioner to be below the average intelligence level, depressed with suicidal ideations, and under a great deal of stress. *Id.* There was no indication from Dr. Khanna that the Petitioner was incompetent. *Id.*

Dr. William Kenner was appointed by the Davidson County Probate Court in 1992 to determine whether the Petitioner was competent to make decisions about his medical care. *Id.* Dr. Kenner determined that the Petitioner was not competent to make such determinations. *Id.* Dr. Kenner also performed an evaluation of the Petitioner in April 1997 at the request of post-conviction counsel. *Id.* At the time of the post-conviction hearing, Dr. Kenner believed the Petitioner to be suffering from chronic, severe paranoid schizophrenia. *Id.* Dr. Kenner informed the post-conviction court that the onset of this illness is preceded by a prodomal phase that slowly develops over a number of months, sometimes years. *Id.*

## Findings of Post-Conviction Court

On May 5, 2004, the post-conviction court denied the Petitioner's request for relief. The trial court, relying upon the instructions provided by the Tennessee Supreme Court in *Van Tran* and *Howell* concluded that the Petitioner did not "meet the definition of mental retardation as set forth by the statute." The trial court denied the motion to reopen. The court's order denying relief was comprehensive and detailed, consisting of approximately fifty (50) pages.

The trial court noted that it must determine "whether petitioner has established, *by a preponderance of the evidence,* that (1) he has significant subaverage intellectual

functioning evidenced by a functional intelligence quotient of seventy or below; (2) he suffers from deficits in adaptive behavior and (3) the deficits in both I.Q. and adaptive behavior developed prior to the age of eighteen. *See Van Tran,* 66 S.W.3d 790, 812, applying Tenn. Code Ann. 39-13-203; *Michael Wayne Howell v. State,* 151 S.W.3d 450 (Tenn. 2004) (filed November 16, 2004 at Jackson)." Applying these guidelines, the court proceeded to evaluate each of the "elements" of "mental retardation independently." Initially, the trial court noted the extreme difficulty in making a determination in this particular case given the fact that the Petitioner speaks very little English; has very little formal education; lived most of his "young life" on the streets of Vietnam and lived most of his adult life in prison; and the fact that the Petitioner suffers from paranoid schizophrenia. With these circumstances present, the trial court questioned that ability of standardized testing to accurately determine the Petitioner's level of intelligence. The court then made the following findings as summarized herein.

The court found that "the [P]etitioner has proven by a preponderance of the evidence that he has a functional intelligence quotient of seventy (70) or below." Although the court found that the 1996 test score of 72 did not satisfy the first criteria of the statute, the additional testing performed upon Petitioner did indicate that the Petitioner's I.Q. was below 70. Specifically, the trial court found that "[a]ll three subsequent I.Q. tests scores [65, 70, and 68] meet the requirements of [Tennessee Code Annotated section] 39-13-203(a)(1)."

Next, the trial court determined that the Petitioner "does not have deficits in adaptive behavior." In making this finding, the trial court noted:

This court notes its agreement with the State's assessment that, due to the unique circumstances of the petitioner's background, some of the questions posed on the Independent Living Scale border on the absurd. Additionally, this court notes the testimony of Dr. Grant on redirect examination, in which he testified that, the three years the petitioner spent in this country as a free person would be sufficient for him to learn some of the skills that are measured by the Independent Living Scale, but certainly not all of them. Moreover, the fact that the petitioner had been incarcerated for more than ten years when these tests were administered certainly effect their efficacy. Thus, despite the assertions of Dr. Auble and Dr. Grant's [sic], this court is convinced by the State's cross examination of the expert witnesses and arguments of counsel, that the Independent Living Scale should be given limited weight in this case. . . . [Likewise, the trial court agreed with the State's argument regarding the efficacy of the Vineland test.] [The trial court found] inherent problems with the administration of the Vineland. Participants are asked to evaluate the petitioner as if he were a free and functioning member of this society and as if the petitioner were seventeen years old. With regard to the petitioner's mother, she herself is barely a functioning member of this society and has not seen her son on a consistent basis for almost fifteen years. She is likely very unfamiliar with many of the tasks listed in the Vineland. Additionally, once she and the petitioner came to the United States they were only living together for a short time; thus, she had very little opportunity to observe the petitioner in a "traditional" setting. Therefore, this court finds the Vineland conducted with the petitioner's mother should be

> given very little, if any, weight. The Vineland was also administered to a Vietnamese prison guard at the facility where the petitioner is being held. The court finds the efficacy of this test to be questionable as well. When the test was administered, the petitioner had been incarcerated for over ten years. Petitioner is incarcerated in a manner that severely restricts his activities and in a manner that provides a strictly controlled environment. . . . He is not required to cook for himself; he is told when and how much medicine to take; he is given medical treatment when needed, without request; he is provided facilities and opportunities for attending to his personal hygiene. All of these areas are covered by the Vineland, yet in this case, the petitioner has lived in an environment for over ten years where he does not have to do anything for himself. Moreover, the prison guard has never observed the petitioner in any other environment. Therefore, the court also finds little weight should be given to the Vineland administered to the prison guard.

The post-conviction court also considered the testimony and testing completed by both Dr. Grant and Dr. Auble. Even so, the court found that the Petitioner "fails to meet his burden under the second prong of the statute. While the court does find that there is overwhelming proof that the petitioner suffers from deficits in the area of communication, of the ten AAMR criteria, this is the only area in which the court finds there to be deficits." " . . . [W]ith regard to the remaining criteria, this court finds no deficits." Despite Dr. Auble's testimony that petitioner's frontal lobe functioning indicates deficits in the areas of self-direction and social interpersonal skills, this court does not find deficits in these areas. Dr. Auble testified

that she found the petitioner was mentally rigid and unable to adapt to new situations or modify his behavior. However, the specific testing which was used by Dr. Auble to evaluate these areas again related to certain language skills such as petitioner's ability to figure out the meaning of new words. Thus, the results of these tests were likely skewed by the fact that petitioner has a limited grasp of the English language. The court stated the following:

> The assertion that petitioner has deficits in the areas of self-direction and social skills is further contradicted by testimony at petitioner's trial. At the trial, petitioner's sponsor, Ms. Mitchell testified that petitioner cared for her while she was ill; cooked for her family and even cared for her children, including a child who suffers from cerebral palsy. . . . Testimony at trial also indicated that petitioner was able to hold a job and was even promoted to a job with more responsibility. . . . Additionally, after the murders, petitioner fled the city and evaded arrest for six months; and testimony at trial indicated it was the petitioner who negotiated the sale for the stolen gold and split up the proceeds amongst his co-defendants. . . . Moreover, any mental rigidity or ability to adapt could just as likely be attributable to cognitive dysfunction associated with petitioner's schizophrenia or treatment he is receiving for that condition.

The trial court accredited little weight to Dr. Auble's finding that the Petitioner demonstrated deficits in the area of health and safety as this finding was based largely upon the Independent Living Scale. The court further found that, because the Petitioner had spent most of his life living either on the streets or in prison, the Petitioner had little opportunity to develop or refine the

skills associated with this criteria. Finally, the trial court found no deficit in the area of functional academics. While the court acknowledged that the Petitioner had deficits in the area of reading proficiency and language skills, the court found that the deficits were more in the area of communication rather than functional academics. In this regard, the trial court noted that the Petitioner only attended school in the United States for one year and attended school in Vietnam sporadically for a period of only two years. The court further noted that the Petitioner's score on one test was not below average and that other testing revealed a pattern where the Petitioner's math scores were higher than his reading scores. The court stated that, while the test scores indicated "some academic deficit," the court was unable to conclude that the results indicated "an overall deficit in the area of functional academics." In summary, the court concluded, "[A]lthough this court finds petitioner has deficits in one of the criteria listed in the Manual of the American Association of Mental Retardation, 9th Edition, namely, communication, this is not enough to conclude petitioner has deficits in adaptive behavior. Petitioner must demonstrate deficits in at least two of the listed criteria; thus, petitioner has failed to demonstrate that he has deficits in adaptive behavior as required by [Tennessee Code Annotated section] 39-13-203(a)(2)."

Regarding the third prong, the post-conviction court found that the Petitioner "failed to demonstrate that any such [adaptive] deficits manifested during the developmental period as required by part (a)(3) of the statute." Both parties agreed that no test of intellectual functioning was administered to the Petitioner prior to his reaching the age of eighteen or prior to his incarceration. The court

noted that the Petitioner was first tested ten years after his incarceration. With consideration that no testing was performed until a decade after his incarceration, the court determined that the Petitioner could not establish that he satisfied the final prong of the statutory criteria. In so finding, the court concluded that neither Dr. Auble nor Dr. Grant could offer any real proof to establish that the deficits occurred prior to age eighteen. The court further relied upon the testimony and social history prepared by Doan Dinh at the first post-conviction proceeding. The court was not convinced that certain factors present in the Petitioner's childhood were indicative that the Petitioner's deficits manifested during this time. In this respect, the court determined that the Petitioner's late development could have been the result of "neglect" rather than neurological deficit. Finally, the court observed that the Petitioner suffered from paranoid schizophrenia. This diagnosis was made ten years earlier and at least one expert testified that over time this disease would erode brain functioning. Thus, the court concluded that it was also likely that any deficits in intellectual functioning occurred as a result of this disease. In reaching this conclusion, the court noted that the Petitioner "suffered from schizophrenia for nearly eight years prior to being diagnosed and treated.

The trial court noted that this prong, like the adaptive deficit prong, was subjective. The court stated that this prong could be established by school records, medical records, documented social history, and observations of evaluating experts. "In this case[,] there are no school records, no medical records, very little documented social history and the observations of the experts on this point are speculative at best." The trial court concluded that "in

light of the proof presented, it is not possible to discern when the petitioner's deficits in intellectual functioning developed, this court finds petitioner has also failed to meet his burden with respect to the third prong of the statute."

**Summary of Applicable Law**

In 1990, Tennessee Code Annotated section 39-13-203 was enacted prohibiting the execution of mentally retarded individuals. *See Howell v. State,* 151 S.W.3d 450, 456 (Tenn. 2004). While our supreme court determined that this legislation was not to be applied retroactively, the high court did hold that the execution of mentally retarded persons violated constitutional prohibitions against cruel and unusual punishment. *Id.* (citing *Van Tran,* 66 S.W.3d 790, 798-799 (Tenn. 2001)); cf. *Atkins v. Virginia,* 536 U.S. 304, 321, 122 S. Ct. 2242 (2002) (execution of mentally retarded individuals violates the United States Constitution).

As the Petitioner was convicted prior to the enactment of the statute, our supreme court determined that a claim that he was mentally retarded should be brought under procedures for re-opening a petition for post-conviction relief. *Van Tran,* 66 S.W.3d at 811-812. Moreover, while section 39-13-203 did not apply retroactively to the Petitioner's case, the supreme court held that the proper criteria for evaluating his claim of mental retardation were those set forth within the statute. *Van Tran,* 66 S.W.3d at 812.

Section 39-13-203 provides the following definition of mental retardation:

(1) Significantly sub-average general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;

(2) Deficits in adaptive behavior; and

(3) The mental retardation must have been manifested during the developmental period or by eighteen (18) years of age.

All three criteria must be satisfied before a finding of mental retardation may be made. Moreover, our supreme court noted that the demarcation of an I.Q. score of seventy (70) in the statute is a "bright-line cutoff" and must be met. *Byron Black v. State,* No. M2004-01345-CCA-R3-PD, 2005 WL 2662577, at *12 (citing *Howell,* 151 S.W.3d at 456, 458-59. "[T]he statute should not be interpreted to make allowance for any standard error of measurement or other circumstances whereby a person with an I.Q. above seventy could be considered mentally retarded." *Id.* (quoting *Howell,* 151 S.W.3d at 456).

Later, in *Howell,* the supreme court established the standards to be applied by the post-conviction court, delineated the appropriate burdens of proof, and determined that a petitioner is not entitled to have a jury determine whether he is mentally retarded. *Byron Black v. State,* No. M2004-01345-CCA-R3-PD, 2005 WL 2662577, at *11 (Tenn. Crim. App., at Nashville, Oct. 19, 2005), *perm. to appeal denied,* (Tenn. Feb. 2006) (citing *Howell,* 151 S.W.3d at 457-58, 463-65). Our supreme court noted that, in a motion to reopen a post-conviction proceeding, defendants must present facts which "would establish by clear and convincing evidence" that they are entitled to relief. *Howell,* 151 S.W.3d at 460. (citing T.C.A. § 40-30-117(a)(4)).

However, the court, utilizing principles of due process, lowered the standard to the lesser "colorable claim" standard when claims are raised under *Van Tran* and *Atkins*. *Id.* at 463. Should the defendant set forth a "colorable claim" of mental retardation in his motion, he is entitled to an evidentiary hearing. *Id.*

Next, the court addressed the level of proof required in proving the allegations raised in the motion. Our supreme court, acknowledging the disparity between the burden placed on defendants at trial (preponderance of the evidence) and those in the post-conviction stage (clear and convincing evidence), held that due process prohibited the application of the higher standard of proof at the post-conviction stage. *Id.* at 463-64. Accordingly, the court held that "at an evidentiary hearing, [a defendant] will have the opportunity to prove mental retardation by preponderance of the evidence." *Id.* at 465. In so holding, the court recognized that, although its "holding . . . is at odds with the standard set out in Tennessee Code Annotated section 40-30-117," "it would violate due process to execute a defendant who is more likely than not mentally retarded." *Id.* at 464-65. Finally, the *Howell* court considered whether a defendant is entitled to have a jury determine whether he is mentally retarded with consideration of the United States Supreme Court rulings in *Apprendi v. New Jersey* and *Ring v. Arizona*. Our supreme court rejected Petitioner Howell's argument that a "defendant's lack of mental retardation is the functional equivalent of an aggravating circumstance . . . [that] must be found by a jury." *Howell*, 151 S.W.3d at 465. In so doing, our supreme court acknowledged that the United States Supreme Court, in *Atkins*, had "pointedly expressed that mental retardation should be considered apart from mitigating

factors." *Howell,* 151 S.W.3d at 466. Additionally, our legislature placed the prohibition on executing mentally retarded individuals in Tennessee Code Annotated section 39-13-203, rather than placing it among the mitigating factors listed in Tennessee Code Annotated section 39-13-204(j). *Howell,* 151 S.W.3d at 466. The court held that the issue of mental retardation is "not one of aggravating or enhancing factors, but of eligibility for the sentence imposed by a jury." *Id.* The court further held that "mental retardation works to reduce the maximum possible sentence, based upon the jury's verdict, from death to life imprisonment." *Id.* at 467. In this regard, "[mental retardation] is not an element of the offense and is not required to be proven by the State nor found by a jury." *Id.* Based upon these conclusions, our supreme court held that "the determination of mental retardation is more appropriately left to the trial court judge, as contemplated under Tennessee Code Annotated section 39-13-203(c) which states '[t]he determination of whether the defendant was mentally retarded at the time of the offense of first-degree murder shall be made *by the court.*'" *Id.* (emphasis in original). The court also noted that "the burden of persuasion in this respect in upon the defendant rather than the State." *Id.* (citing T.C.A. 39-13-203(c).

## I. Right to Jury Determination on Mental Retardation

The Petitioner contends that the United States Constitution guarantees the Petitioner the right to a jury determination wherein the State shall have the burden to disprove his mental retardation beyond a reasonable

doubt.[1] The State responds that this claim is waived as the issue was not raised in the initial motion to reopen and because no court has ever granted a motion to reopen on this specific issue. Alternatively, the State asserts that this issue was rejected by our supreme court in *Howell v. State.* Our supreme court rejected the argument made by the Petitioner in *Howell v. State. See supra.* Accordingly, the Petitioner is not entitled to relief on this issue.

## II. Whether the Petitioner is Mentally Retarded Pursuant to T.C.A. § 39-13-203

### A. Standard of Review

The question of whether a defendant is mentally retarded and, thus, ineligible for the death penalty is a mixed question of law and fact. *Byron Black v. State,* No. M2004-01345-CCA-R3-PD, 2005 WL 2662577, at *12. Thus, this Court must review the post-conviction court's findings of fact de novo, with a presumption of correctness that is to be overcome only when the preponderance of the evidence is contrary to the court's findings. *Id.* (citing *Fields v. State,* 40 S.W.3d 450, 456 (Tenn. 2001)). In reviewing the application of the law to the facts, however, this Court conducts a purely de novo review. *Id.* (citing *Fields,* 40 S.W.3d at 457). Thus, no presumption of correctness attaches to the post-conviction court's conclusions of law. *Id.*

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[1] The Petitioner acknowledges that this issue is raised to preserve review by the United States Supreme Court. *See State v. Gomez,* 163 S.W.3d 632 (Tenn. 2005) (defendant not precluded from raising claim simply because prior decision rejected same).

### B. Tennessee Code Annotated § 39-13-203

In determining whether the Petitioner is mentally retarded and, thus, ineligible for the death penalty, this Court is bound by our supreme court's decisions in *Van Tran* and *Howell*. As such, the applicable criteria to be used by a court in making a determination of mental retardation are those set forth in Tennessee Code Annotated section 39-13-203. As previously noted, Tennessee Code Annotated section 39-13-203 sets forth the criteria for making a determination of mental retardation as it impacts one's eligibility for the death penalty. Section 39-13-203 provides, in part,

> (a) As used in this section, "mental retardation" means:
>
> (1) Significant subaverage general intellectual functioning as evidence by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and
>
> (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

T.C.A. § 39-13-203(a). All three prongs of this definition must be satisfied to establish mental retardation.

### C. Standard of Proof

In *Howell v. State,* our supreme court held that "at an evidentiary hearing, [a defendant] will have the opportunity to prove mental retardation by preponderance of the evidence." *Howell,* 151 S.W.3d at 465. A preponderance of the evidence means evidence which is of greater weight, or

is more convincing, than that evidence offered in opposition. 32A C.J.S. Evidence 1312 (2005). "[T]he term does not mean preponderance in amount, but implies an overbalancing in weight, and that it means, in the last analysis, 'probability of the truth.'" *Id.* (internal footnote omitted). "Suspicions are insufficient to amount to proof by a preponderance of the evidence." *Id.*

The satisfaction of this "preponderance" standard requires the finder of fact to evaluate the evidence, determine what evidence is reliable, and determine what evidence is probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty. *Id.* In other words, a preponderance is such proof as leads the trier of fact to find that it is more probable than not, or more likely than not, that a contested fact exists. *Id.* A preponderance is attained where the evidence in its quality of credibility destroys and overbalances the equilibrium. *Id.* Moreover, it is not required that the trier of fact must be "entirely" or "thoroughly" satisfied or convinced, or satisfied with "clearness and certainty," or that a fact in issue shall be proved to "full satisfaction" or to "the reasonable satisfaction" of the trier of fact. *Id.* The probabilities must be such that the conclusion is acceptable to the judgment of the court or jury applied to the evidence in the particular case; mere proof of possibility, or possibilities, or even a preponderance of possibilities or a majority of chances, or a choice of probabilities, or among different possibilities, never can suffice alone to establish a proposition of fact.

### D. Petitioner's Argument

The Petitioner makes numerous complaints regarding the trial court's findings of fact and conclusions of law. Additionally, the Petitioner properly points out that this Court's review involves an application of the law to the facts and is de novo. In this regard, the Petitioner asserts that: (1) the credibility of the witnesses was not an issue in these proceedings; (2) the trial court was not choosing between two permissible views of the evidence because the State failed to present any witnesses or evidence; and (3) the judge at the evidentiary hearing was not the judge who presided over the original trial or the original post-conviction proceeding and, in this regard, was not in better position than this Court to review the transcripts of these prior proceedings. The Petitioner also asserts that the trial court improperly attempted to exercise "clinical judgment" in finding that the Petitioner did not have deficits in adaptive behavior and that his subaverage intellectual functioning did not manifest during his developmental period.

### E. Review

#### 1. Significantly Subaverage General Intellectual Functioning

The post-conviction court found that the Petitioner has subaverage general intellectual functioning as evidenced by a functional I.Q. of 70 or below. The court found that "the [P]etitioner has proven by a preponderance of the evidence that he has a functional intelligence quotient of seventy (70) or below. Although the court found that the 1996 test score of 72 did not satisfy the first criteria of the statute, the additional testing performed upon the

Petitioner did indicate that the Petitioner's I.Q. was below 70. Specifically, the trial court found that "[a]ll three subsequent I.Q. tests scores [65, 70, and 68] meet the requirements of [Tennessee Code Annotated] section 39-13-203(a)(1)." The Petitioner does not contest the lower court's conclusion as the first prong of the statute. We agree with the post-conviction court that the proof presented by the Petitioner establishes that he currently has a functional intelligence quotient of seventy (70) or below.

### 1. Deficits in Adaptive Behavior

The second prong of the statutory criteria for establishing mental retardation, "adaptive functioning" refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, socio-cultural background, and community setting." *Van Tran,* 66 S.W.2d at 795 (citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 40 (4th ed. 1994)). A mentally retarded individual will have significant limitations in at least two of the following basic skills: "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Id.* Influences on adaptive functioning may include the individual's "education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation." *Id.* In 1994, our supreme court construed the term deficits in adaptive behavior in its ordinary sense as "the inability of an individual to behave so as to adapt to

surrounding circumstances." *State v. Smith,* 893 S.W.2d 908, 918 (Tenn. 1994).

The trial court determined that the Petitioner "did not have deficits in adaptive behavior." The Petitioner contests this finding. Specifically, the Petitioner asserts on appeal that the proof established by a preponderance of the evidence that he exhibits deficits in adaptive behavior, including (1) deficits in communication, (2) deficits in functional academics, and (3) deficits in social skills and self-direction. Moreover, the Petitioner asserts that he has scored two standard deviations below the mean on standardized tests of adaptive behavior indicating, under the AAMR 10th, that he has deficits in adaptive behavior. The Petitioner also asserts that it is contradictory for the trial court to find that the results of the I.Q. tests are valid, but that the results of tests measuring functional academics and neurological impairment should be disregarded because they were given in English without the aid of an interpreter.

At the evidentiary hearing, Dr. Auble, relying upon the AAMR, Tenth Edition, categorized adaptive deficits into three main areas: (1) Practical, which she explained as the ability to maintain yourself independently in terms of academics and work environment; (2) Social, which she stated involved gullibility, social understanding, the ability to avoid being a victim, taking responsibility, and home skills; and (3) Conceptual, which she defined as an area involving language, reading, writing, managing money, self-direction, and abilities.

### A. Deficits in Communication

Dr. Grant testified that the Petitioner had "deficits in adaptive behavior as defined by the American Association of Mental Retardation and the American Psychiatric Association." He administered various tests to evaluate the Petitioner's language and communication skills. After evaluating the Petitioner's performance on these tests, Dr. Grant described the Petitioner's language and communication skill deficits as "severe." He added that the Petitioner's score on an expressive vocabulary test were "the lowest score that the norms would go to . . . " and that the Petitioner's score on the oral written language skills test revealed a significant deficit. Although Dr. Grant conceded that the Petitioner's native language is Vietnamese and that the tests were administered in English, he surmised that this fact did not skew the results reached. Specifically, Dr. Grant noted that the Petitioner's comprehension in Vietnamese was poor and that the Petitioner's English proficiency exceeded his proficiency in Vietnamese. Dr. Grant concluded that the Petitioner's deficits in communication skills satisfied one of the two criteria needed by the classification system for retardation.

The trial court did conclude that "there is overwhelming proof that the petitioner suffers from deficits in the area of communication, of the ten AAMR criteria. . . ." The Petitioner does not contest this finding made by the trial court.

### B. Deficits in Functional Academics

Dr. Grant conducted an assessment of the Petitioner's academic skills. As a result of his evaluation, Dr. Grant concluded that the Petitioner had a reading comprehension

score of 4.1 and had a reading grade level of 3.1. He added that the Petitioner's spelling was at a 4.1 grade level and that his math skills were at a 7.6 grade level. Dr. Grant concluded that the Petitioner's proof performance in spelling, reading, and reading comprehension were evidence of a significant deficit. He further commented that, although the Petitioner had been in a G.E.D. program classroom for eight to nine years, he is still scoring at a 4.1 grade level in reading. Based upon the Petitioner's scores, Dr. Grant stated that the Petitioner's "functional academic skills are significantly impaired," thus satisfying another of the criteria needed by the classification system for retardation."

### C. Deficits in Social Skills and Self-Direction

The Petitioner contends that the trial court's findings are incorrect. First, he contends that that the trial court's finding that the results on the Halstead Reitan battery were skewed "by the fact that petitioner has a limited grasp of the English language" is without support in the record. Next, he contends that the trial court attempted to exercise clinical judgment and raised the evidentiary bar by demanding of the petitioner a level of incapacity that is not required for a finding of adaptive deficits. The Petitioner also finds fault with the trial court's statement that the Petitioner's mental rigidity or inability to adapt "could just as likely be attributable to cognitive dysfunction associated with petitioner's schizophrenia or treatment he is receiving for that condition" as being both speculative and based on a misreading of the record. The Petitioner asserts that the cumulative effect of these errors compromises the trial court's analysis and findings.

### D. Petitioner Scored Two Standard Deviations Below the Mean

The Petitioner asserts that the AAMR, Tenth Edition, provides that adaptive behavior can be assessed through the use of standardized instruments. *See* AAMR, 10th Edition, p. 76 ("an overall score on a standardized measure of conceptual, social, and practical skills.). He relies upon two different standardized tests of adaptive behavior to support his assertion that the fact that both of these test scores were two standards deviations below the mean are proof of adaptive deficits. In this regard, he contends that the trial court's failure to accredit the results of these standardized tests was error.

Dr. Grant administered the Independent Living Scales test to the Petitioner. The Petitioner received a score of 69. He related that this score fell two standard deviations below the mean, thus satisfying the criteria for having a significant deficit in adaptive behavior. Similarly, the Petitioner received scores of 58 and 65 on two successive administrations of the Vineland adaptive behavior scale. Both of these measures satisfied the criteria for the American Association of Mental Retardation as two standard deviations below the mean for adaptive behavior.

Dr. Auble corroborated the testimony of Dr. Grant by stating that standardized tests were used to determine whether a person had adaptive deficits. Dr. Auble testified that the Petitioner's scores on the Independent Living Scale and the two Vineland tests placed the Petitioner in the impaired range, that is two standard deviations below the mean. She explained that, according to both the AAMR and the DSM-IV, these test scores were illustrative of adaptive deficits.

### E. Review of Trial Court's Findings Regarding Deficits in Adaptive Behavior

Despite the testimony of the Petitioner's experts and the fact that the State presented no evidence, the trial court rejected the results of the standardized tests and the opinions of the Petitioner's experts. The Petitioner implies that this fact, alone, is error. While the State presented no new evidence at the evidentiary hearing on the motion to reopen, the trial court need not review the evidence presented at the motion to reopen in a vacuum. In other words, information regarding the Petitioner presented at prior proceedings is relevant in making a proper determination regarding mental retardation. *See In re: Anderson Hawthorne, Jr.,* 105 P.3d 552, 559 (Cal. 2005); *Morrison v. State,* 583 S.E.2d 873, 876 (Ga. 2003). In this regard, we note that the trial court is neither bound by the opinion of expert witnesses nor by test results. *In re: Anderson Hawthorne, Jr.,* 105 P.3d at 559. Rather, the court may weigh and consider *all* evidence bearing on the issue of retardation. *Id.* (citations omitted). Thus, the trial court properly considered evidence introduced at prior proceedings, including the penalty phase of the trial and the prior post-conviction proceeding.

In the present case, the trial court determined that the "unique circumstances of [the] petitioner's background," rendered questions posed on the Independent Living Scale "absurd." Similarly, the trial court rejected the results of the Vineland tests. The trial court observed that these tests required that two observers, the Petitioner's mother and a correctional officer, evaluate the Petitioner as if he were a free and functioning member of society. The trial court discredited these observations, noting that the Petitioner's mother had not seen him on a

consistent basis for approximately fifteen years and the correctional officer had never observed the Petitioner in a non-institutionalized setting. The trial court further determined that the Petitioner was in a position unique to other individuals, and those circumstances impacted the efficacy of the testing and evaluation procedures. The trial court added that the circumstances of the offense contradicted the findings of the Petitioner's experts regarding deficits in adaptive behavior.

Adaptive behavior means the effectiveness or degree with which a person meets the standards of personal independence and social responsibility expected of the person's age and cultural group. *See* American Association on Mental Deficiency (AAMD), at 11. The adaptive behavior criteria are exceedingly subjective, and, undoubtedly, experts will be found to offer opinions on both sides of the issue in most cases. There are evidentiary factors, however, which factfinders in the criminal trial context may focus upon in weighing evidence as indicative of mental retardation or of a personality disorder, including:

1. Did those who knew the person best during the developmental stage think the person was mentally retarded at that time and, if so, act in accordance with that determination?

2. Does the person's conduct show leadership or does it show that he is led around by others?

3. Is his conduct in response to external stimuli rational and appropriate, regardless of whether it socially acceptable?

4. Does the person respond coherently, rationally, and on point to oral or written questions or do his responses wander from subject to subject?

5. Can the person hide facts or lie effectively in his own or others' interests?

6. Did the commission of the offense require forethought, planning and complex execution of purpose?

*See Ex parte Jose Garcia Briseno,* 135 S.W.3d 1 (Tex. Crim. App. 2004).

Although experts may offer insightful opinions on the question of whether a particular person satisfies the psychological diagnostic criteria for mental retardation, the ultimate issue of whether a person is, in fact, mentally retarded for purposes of the constitutional ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility. *Ex parte Jose Garcia Briseno,* 135 S.W.3d at 1 (citing *Kansas v. Crane,* 534 U.S. 407, 413, 122 S. Ct. 867 (2002) (noting that "the science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law"); *State v. Williams,* 831 So.2d 835, 859 (La. 2002) (in determining *Atkins* claim, "the trial court must not rely so extensively upon this expert testimony as to commit the ultimate decision of mental retardation to the experts.").

We agree with the trial court's assessment that the Petitioner is in a unique position. The Petitioner was born in Vietnam. There is no question that the Petitioner's childhood was atypical. His social history reveals abuse,

neglect, and social ostracism. He essentially "lived on the streets" until age seventeen when he came to this country through the assistance of Catholic Charities. The Petitioner's formal schooling was limited to several years in Vietnam and about one year in this country. The Petitioner has spent the majority of his time in this country incarcerated. While the Petitioner's experts maintained that the Petitioner was more proficient in the English language than in Vietnamese, proof at the Petitioner's original post-conviction hearing indicated that the Petitioner had difficulty communicating with trial counsel until a Vietnamese interpreter was appointed. A social worker with Catholic Charities testified that the Petitioner spoke and understood the Vietnamese language. The Petitioner has a history of drug and alcohol use. The Petitioner has also been diagnosed with paranoid schizophrenia. The proof also corroborates the trial court's conclusion that the Petitioner was in a position unique to most American adults. Dr. Grant conceded that the Petitioner had probably never "filled out a check, or a money order." Moreover, there is no indication that the testing questions took into account the Petitioner's lifestyle in Vietnam or that he has spent the majority of his adult life incarcerated. Accordingly, we agree with the trial court's assessment that little weight should be given to the Petitioner's below average score on the Independent Living Scale.

As recognized by the United States Supreme Court, "[n]ot all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders abou whom there is a national consensus." *Atkins,* 536 U.S. at 317, 122 S. Ct. at 2242. The circumstances of the Petitioner's crime belie any assertion that the Petitioner suffered from any deficit in intellectual

ability or adaptive skills. The Petitioner had previously been employed by the victims of his crime. He knew the layout of the restaurant and knew that jewelry was kept on the premises. The Petitioner did the talking with one of the victims at the onset of the crime. The Petitioner was the person that went into the office to collect the jewelry. After the crime, the Petitioner escaped with two of his co-defendants to Houston, Texas, where it was the Petitioner who arranged to sell the jewelry to a Vietnamese man for $4,000. It was also the Petitioner who paid this man from the proceeds and divided the money with his two co-defendants. The Petitioner's active participation and planning in the offense is the "opposite end of the spectrum from [the] behavior of mentally retarded offenders." *Atkins,* 536 U.S. at 319-20, 122 S. Ct. at 2242.

This court defers to the trial court's findings of fact as they are supported by the record. The determination of what constitutes mental retardation in a particular case varies sharply depending upon who performs the analysis and the methodology used. Although the defense experts testified that the Petitioner demonstrated proficient deficits in adaptive behavior, the trial court found to the contrary. We agree. In the legal setting, the court must not become so entangled with the opinions of psychiatric experts that we lose sight of the nature of the criminal offense itself. We must also not turn a blind eye to the defendant's ability to use society to better his needs. There are mentally retarded persons who are criminals, but they tend to commit fairly primitive crimes, impulsive crimes, and sudden acts of violence. The more complex the crime, however, the less likely that the person is mentally retarded. Thus, the court cannot forget to examine the nature of the criminal conduct and the circumstances

involved in that conduct when determining whether a person is mentally retarded. Because there is ample evidence in the record to support the trial court's factual determinations, we adopt its findings.

### 3. Manifestation During Developmental Period

Finally, the Petitioner contends that a preponderance of the proof established that mental retardation manifested during the developmental period. The Petitioner asserts that the trial court required proof greater than a preponderance of the evidence and that the trial court misread and misconstrued the record. The Petitioner cites to evidence in the record as establishing that it was "more likely than not" that the Petitioner's intellectual functioning was subaverage in the developmental period. Specifically,

1. The results of achievement tests administered when the Petitioner was 17 years of age are consistent with his current I.Q. Dr. Grant testified that there is a "very high, strong correlation between achievement and intelligence."

2. Dr. Grant testified to the fact that I.Q. is relatively stable over time. He also found it significant that despite 9 years of participation in G.E.D. classes at the prison, the Petitioner still reads at the same 4th-grade level that he read at when he was tested at age 17.

3. The Petitioner suffers from schizophrenia. Long-term studies have shown that children who develop schizophrenia in adulthood

have low I.Q.'s in childhood: their low functioning exists prior to the onset of the disease.

4. As a child, the Petitioner exhibited significant impairments and delays in reaching developmental milestones, particularly the ability to use language. He has never acquired more than a child-like use of his native Vietnamese, which also indicated that his intellectual and adaptive impairments manifested in the developmental period.

5. Petitioner's early life was beset with numerous known risk factors which predisposed him to mental retardation, e.g.: maternal poverty, maternal malnutrition during pregnancy, lack of prenatal care, injuries during pregnancy, maternal smoking during pregnancy, low intelligence of the mother, lack of preparation for parenthood, lack of medical post-natal care, malnutrition, family poverty, lack of adequate stimulation, lack of schooling, inadequate safety measures, physical abuse, lack of intervention services, lack of special education services, and inadequate family support.

The Petitioner had not been administered any test of intellectual functioning prior to reaching the age of eighteen, and no testing was performed until ten years after his incarceration. The only proof establishing this third prong were reliance upon social factors present in the Petitioner's childhood, including extreme poverty and child abuse. In this regard, we cannot conclude that the trial court's conclusion that the Petitioner's late development could have been the result of "neglect" rather than neurological deficit was in error or contrary to the evidence. The

evidence of poverty, child abuse, lack of education, family dysfunction and poor social conditions are not enough to demonstrate that any deficits manifested during the developmental period. The proof established that the Petitioner supported himself, took care of others, and was employed. The proof also established that the Petitioner, with the aid of an interpreter, was able to assist and communicate with his trial attorneys. The occurrences of these abilities all occurred after the age of eighteen. Moreover, we conclude that the fact that the Petitioner admits to alcohol and drug abuse and the fact that he has been diagnosed with schizophrenia may have impaired his brain functioning. Finally, Dr. Auble's litany of potential "risk factors" fail to provide sufficient facts to support the conclusion that any impairments were revealed during the developmental period. Accordingly, Petitioner cannot satisfy the third prong of the test for mental retardation.

## Conclusion

While there is expert opinion in this record that would support a finding that the Petitioner is mentally retarded pursuant to Tennessee Code Annotated section 39-13-203, there is also ample evidence to support the trial court's finding that the Petitioner failed to prove that he is mentally retarded by a preponderance of the evidence. The circumstances of every case are unique as are the circumstances of every defendant. Circumstances exist in this case which cloud the picture, particularly the contradictory proof regarding the Petitioner's Vietnamese background, i.e., whether Vietnamese or English is the Petitioner's proficient language. *See Jose Alfredo Rivera v. Doug Dretke,* No. Civ. B-03-139, 2006 WL 870927, *15 (S.D. Tex. Mar. 31, 2006). Additionally, extraneous factors,

i.e., drug use and mental illness, further skew the determination of mental retardation. These factors, in connection with the requirement that experts must speculate retrospectively as to what conditions existed prior to the age of eighteen and the obvious motivation in making such claim, further complicate this court's duty on appeal. We defer to the trial court's determinations of credibility and adopt the trial court's ultimate findings of fact. Based on those findings and this court's independent review, we conclude that the trial court's determination that the Petitioner is not mentally retarded pursuant to Tennessee Code Annotated section 39-13-203, should be affirmed. Finding no other error in the record, the trial court's denial of relief is affirmed.

JOHN EVERETT WILLIAMS,
JUDGE

**IN THE CRIMINAL COURT OF TENNESSEE
FOR THE THIRTIETH JUDICIAL
DISTRICT AT MEMPHIS
DIVISION III**

| | |
|---|---|
| **HECK VAN TRAN** | ) |
| **Petitioner** | ) |
| | ) Case No. P-14409 |
| **v.** | ) FILED 5-5-04 |
| **STATE OF TENNESSEE** | ) |
| | ) WILLIAM R. KEY, CLERK |
| **Respondent** | ) BY: /s/ [Illegible] D.J. |

**ORDER
DENYING PETITIONER'S
MOTION FOR POST-CONVICTION RELIEF**

This matter came to be heard upon the motion of petitioner, Heck Van Tran, to re-open his post-conviction petition. Petitioner asserts he is mentally retarded; and, thus, ineligible, under, the Eight Amendment to the United States Constitution and Article 1, § 16 of the Tennessee Constitution, to receive the death penalty. Petitioner argues that the testimony presented in support of his motion established, by a preponderance of the evidence, that he meets the definition for mental retardation as outlined in Tennessee Code Annotated § 39-13-203 and *Heck Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001). After reviewing portions of testimony from the original trial; testimony from the original post-conviction hearing; the evidence presented in support of Petitioner's motion; and arguments of counsel, this court finds that petitioner does not meet the definition of mental retardation as set forth by the statute. Thus, petitioner's Motion to Reopen Post Conviction is denied.

## PROCEDURAL BACKGROUND

In June of 1989, the petitioner was convicted of three counts of felony murder for the shooting deaths of Kai Yin Chuey, Amy Lee and Arthur Lee.[1] The jury fixed his punishment at death for each offense. The petitioner was also convicted of robbery by the use of a deadly weapon and the trial court sentenced him to thirty years imprisonment, to be served concurrently with the above sentences. On direct appeal of his convictions and sentences, the Tennessee Supreme Court affirmed all three murder convictions but affirmed petitioner's death sentence as to only one victim, Kai Yin Chuey. Finding the jury had inappropriately applied a statutory aggravating circumstance, the Court reversed petitioner's death sentences for the murder of Arthur Lee and Amy Lee. Thereafter, the case was remanded to the trial court for re-sentencing. *See State v. Heck Van Tran*, 864 S.W.2d 465, (Tenn. 1993). Upon remand, the petitioner received two concurrent life sentences for the murders of Arthur and Amy Lee.[2]

On March 7, 1995, petitioner filed a petition for post-conviction relief. A hearing on petitioner's motion was conducted in October of 1997 and the petition was dismissed by order of the trial court entered February 13, 1998. Petitioner appealed the ruling and the Court of Criminal Appeals affirmed the trial court's denial of post-conviction relief. *See Heck Van Tran v. State*, No. 02-C01-9803-CR-00078 (Tenn.

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[1] A detailed account of the circumstances of this crime as well as all the issues raised on direct appeal can be found in *State v. Van Tran*, 864 S.W.2d 465 (Tenn. 1993).

[2] Petitioner was convicted prior to November 1989; thus, the only available sentence was death or Life with the possibility of parole.

Crim. App. filed April 1, 1999 at Jackson), 1999 Tenn. Crim. App. LEXIS 307.

In his Petition for Post Conviction Relief, Van Tran challenged his general competency to stand trial and his competency to be executed. Additionally, petitioner specifically claimed he was mentally retarded and, pursuant to Tenn Code Ann. § 39-13-203, could not be executed. However, the Court found petitioner failed to raise the issue of his competency to stand trial on direct appeal; thus, the issue was waived for purposes of post-conviction review. Moreover, the court found that the petitioner did not make an appropriate showing that the trial court had any "reasonable basis to order a mental evaluation and/or declare petitioner incompetent, *sua sponte*." *Id.* at *8. The court noted that, although Dr. Khanna, a clinical psychologist, had found petitioner to be below the average intelligence level and depressed, there was no indication that petitioner was incompetent.

Next, with regard to petitioner's competency to be executed, the Court held that Tennessee has no specific statutory procedure by which to address this issue post-trial. *Id.* at *10. While the Court expressed the belief that the petitioner is entitled to be heard "in some forum" on this issue, the Court declined to create a procedure by which this issue might be addressed, finding the legislature and the Tennessee Supreme court are better suited to establish a procedural avenue for redress of such claims. *Id.* At *10-11.

Finally, regarding petitioner's direct claim that he can not be executed because his is mentally retarded, the Court initially noted the State's claim that Tenn. Code Ann. § 39-13-203 is inapplicable since it was not in effect

on the date of the commission of the homicide. The Court did not directly address the State's assertion, but rather dismissed the petitioner's argument based upon their finding that the petitioner failed to demonstrate that he has an I.Q. of seventy (70) or below. In so finding, the Court notes the testimony of petitioner's expert, Dr. Adler, who found petitioner has an I.Q of 67. However, the court further notes that the post-conviction court discredited Dr. Adler's assertion and credited the testimony of the State expert, Lynn Zager, who found that Dr. Adler has miscalculated the petitioner's score and the actual I.Q. score for the administered test was 72. The Court then specifically found that nothing in the evidence presented preponderated against the post-conviction court's finding that Dr. Zagler's calculation of 72 is correct.

Following, the Court of Criminal Appeal decision, the Tennessee Supreme Court granted permission to appeal in order to "clarify the procedure by which a prisoner who has been sentenced to death may raise the issue of present mental competency to be executed." *See Heck Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999). The Court agreed with the intermediate court that petitioner is entitled to have this issue heard; however, they found that post-conviction relief is not the "appropriate mechanism" for raising the issue of present mental competence to be executed. *Id.* The Court then set forth the standard of review and the procedure to be followed when raising the issue of competency to be executed. Finding petitioner's claim was not ripe for consideration, because execution was not "imminent," the Court affirmed the lower courts' rulings denying post-conviction relief. *Id.* at 274. The Court did not address any of the other issues raised by the petitioner's Petitioner for Post-Conviction Relief.

On February 7, 2000, petitioner filed a Motion to Reopen his post-conviction petitioner, claiming that, following the initial denial of relief, he was subsequently administered additional I.Q. testing and he now meets the criteria for mental retardation. The trial court issued an order denying the petitioner's Motion to Reopen, and the Court of Criminal Appeals denied the petitioner's application for permission to appeal. Subsequently, the Tennessee Supreme Court granted petitioner's application for permission to appeal and ordered the parties to file supplemental briefs on the issue of whether the Eighth Amendment to the United States Constitution and Article 1 § 16 of the Tennessee Constitution prohibits the execution of a mentally retarded petitioner. *See Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001). The Court concluded that the execution of the mentally retarded did, in fact, violate the Eighth Amendment to the United States Constitution and Article 1 § 16 of the Tennessee Constitution. Thus, the Court reversed the ruling of the trial court and remanded with specific instructions for determining whether the petitioner is mentally retarded. On remand, the Court ordered the trial court to conduct a full hearing on the petitioner's Motion to Reopen. *Id.* at 812. In determining whether the petitioner is mentally retarded, the Court instructed the trial court to consider the criteria set forth under Tenn Code Ann. § 39-13-203. *Id.*

On September 18, 2003; February 26, 2004; and April 15, 2004, per the Supreme Court's instructions, this court heard testimony on petitioner's Motion to Reopen his post-conviction petition. The attorneys for the State and the petitioner were then given several months to submit written arguments. Shortly, thereafter, the Tennessee Supreme Court issued their decision in the case of *Michael*

*Wayne Howell v. State*, No. W2003-01056-SC-R11-PD (filed November 16, 2004, at Jackson). Relying upon the Court's decision in *Van Tran*, 66 S.W.3d 790 (Tenn. 2001), the petitioner in Howell sought to challenge his death sentence based upon his assertion that he is mentally retarded. The Court held, in pertinent part, that petitioner must establish that he is mentally retarded by a *preponderance of the evidence*, and Tennessee Code Annotated § 39-13-203 clearly and unambiguously requires the petitioner to have an I.Q. of seventy or below to be considered mentally retarded. *Michael Wayne Howell v. State*, at *7. (*emphasis added*) The Court specifically dismissed the assertion of the petitioner that the trial court should utilize a standard error of measurement for I.Q. scores when evaluating intellectual functioning. *Id.* Thus, the court held that trial courts are not required to consider a "range" of scores above the score of seventy when determining whether petitioner has met the first prong of the statutory definition. *Id.* In determining whether the petitioner meets the criteria for mental retardation, this court will rely on the Court's instructions in both *Van Tran*, 66 S.W.3d 790 and *Howell*, No. W2003-01056-SC-R11-PD (filed November 16, 2004, at Jackson).

## TESTIMONY

### A. Original Post-Conviction Proceeding

#### 1. Doan Dinh

Mr. Dinh, a social worker with Catholic Charities, prepared a social history of the petitioner. He testified, at the post-conviction hearing, that the petitioner is the child of a Vietnamese mother and an American service man and lived on the streets of Vietnam until the age of seventeen.

Dinh testified that for the first years of his life, the petitioner was very sick and did not speak. The witness also testified that the petitioner's relationship with his mother was dysfunctional, distant, and co-dependent and that the petitioner's life in Vietnam was very harsh. In addition, Dinh stated that the petitioner was verbally and physically abused by his maternal grandmother and aunt. He described instances where the petitioner was beaten with bamboo and tied naked to a tree, where he was bitten by ants. Dinh, stated that the petitioner also related an instance of sexual abuse by an unknown man.

Next, Dinh testified that because the petitioner is Ameriasian he was denied access to school or employment. According to the witness, the petitioner attended school for only two and a half years. Dinh explained that later in his life, the petitioner and his mother were sent to what was known as the "New Economic Zone." The witness testified that there were no schools, no medical care, limited shelter and petitioner's mother was forced to work long hours away from the petitioner, who was left unsupervised. Dinh stated that at some point the petitioner and his mother were able to escape and returned to Saigon; but, because they were there illegally, they were forced to live on the street. Dinh testified that, during this time, the petitioner began using drugs and alcohol.

Finally, Dinh testified that, starting in 1975, approximately one million Vietnamese immigrated to the United States. He testified that, in 1983, the petitioner and his mother came to the United States and were eventually relocated to Memphis. The petitioner was seventeen at the time and, according to Dinh, received no educational assessment, language training or cultural assimilation. Dinh stated that generally Ameriasian

children who immigrate to the United States are often immature; inadequately socialized; suffer from poor schooling and poor self-image; suffer an intense sense of loss; and are overly clingy or dependent. With respect to the petitioner's American education, Dinh stated that the petitioner attended one year of high school and then dropped out and further stated that the petitioner's Vietnamese language skills were the same as a five year old child. However, Dinh testified that he could understand the petitioner and the petitioner could understand him.

**2. Dr. William D. Kenner**

Dr. Kenner, a child psychiatrist, testified that, in April of 1997, he diagnosed petitioner with chronic, severe, paranoid schizophrenia. He further testified that in August of 1990, petitioner was "clearly psychotic." Dr. Kenner stated that schizophrenia has a "severe effect upon an individual's ability to think rationally during the acute episode." Dr. Kenner explained that there is a "prodromal phase" to the illness, where symptoms exist, such as irrational or uncontrolled outbursts, but where a full blown psychotic break has not occurred. He stated that this phase can last months or even years; and, based on Dr. Khanna's report,[3] he opined that petitioner was in the

[3] Prior to trial, counsel retained the services of Dr. J. L. Khanna, a clinical psychologist. Based upon the examination, Dr. Khanna found petitioner to be below the average intelligence level, depressed with suicidal ideations, and under a great deal of stress. However, there was no indication from Dr. Khanna that petitioner was not competent to stand trial. *See Heck Van Tran v. State*, No. 02C01-9803-CR-00078 (Tenn. Crim. App. filed April 1, 1999), 1999 Tenn. Crim. App. LEXIS 307. In reviewing petitioner's social and medical history, Dr. Kenner

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prodromal phase at the time of his trial. Dr. Kenner supported this theory by reference to petitioner's prison records from September 1989, in the middle of the petitioner's trial, which state that petitioner "seems to experience some disorganization of thinking, confusion and feelings of reality." In the records, petitioner is further described as moody, hypochrondrial, miserable and depressed. All of which, Dr. Kenner, suggests indicates petitioner was suffering from the prodromal phase of schizophrenia. He further testified that the residual effects upon the afflicted individual include cognitive impairment and stated that the longer the individual went untreated, the higher the cognitive impairment. Dr. Kenner specifically stated that as the illness progresses the petitioner will experience further cognitive deterioration and actual damage to the brain itself.

### 3. Dr. Murray Smith

Dr. Smith, an addiction specialist, testified that petitioner suffered from chemical dependency, sleep disorder, and hyperthyroidism. He testified that petitioner started using drugs around age thirteen and in the days and weeks prior to the murder was spending approximately $150 a day on his habit. He described petitioner's sleep disorder as hyper-vigilance and explained that petitioner had all of his life slept for no more than three to four hours a day.

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stated that he reviewed Dr. Khanna's report and used Dr. Khanna's findings in forming the basis of part of his opinion regarding petitioner's present mental abilities.

**4. Dr. Andrew Adler**

Dr. Adler, a psychologist, testified, at the original post-conviction hearing, that petitioner met the standard for mild mental retardation. Dr. Adler stated that, he tested petitioner using the Wechsler Adult Intelligence Scale-Revised ("WAIS-R") and a Vineland Adaptive Behavior Scale. He stated that petitioner had a full scale IQ of 67. Additionally, Dr. Adler testified that petitioner suffered from deficits in adaptive behavior. Specifically, he stated that both petitioner's English and Vietnamese vocabulary skills were at the level of a seven year old. Thus, he found petitioner to be functionally illiterate. Dr. Adler further stated that, even though petitioner had not been tested prior to his administration of the WAIS-R, the fact that petitioner did not speak until he was almost eight indicated that he was impaired prior to the age of 18.[4] Therefore, he testified that petitioner meets the definition for mental retardation as established in Tenn Code Ann. §39-13-203.

On cross-examination, Dr. Adler admitted that in reviewing petitioner's history, he did not examine the actual trial transcripts or medical records, but relied upon summaries provided by petitioner's counsel. He further stated that he did not speak directly to trial counsel or to Dr. Khanna, the psychologist who examined petitioner prior to trial. He further stated that although the petitioner's IQ score was 67 it could be higher due to the fact that the test was normed exclusively for English speaking American citizens. He also stated that he had not used an

[4] This court notes that, while this testimony from Dr. Adler, seems to indicate petitioner did not speak until the age of eight, the bulk of the proof indicates petitioner first spoke around the age of six.

interpreter when administering the test. Dr. Adler admitted that petitioner scored particularly low on the verbal portion of the test. Finally, Dr. Adler stated that he could not say whether petitioner's mental illness would have effected his cognitive functioning.

### 5. Dr. Lynn Zager

Dr. Zager, a psychologist testifying for the State, stated that her review of Dr. Adler's raw testing data indicated that petitioner's I.Q. was not 67, but rather 72. She explained that Dr. Adler's calculations did not match the standardized conversion chart for the WAIS-R. Dr. Zager explained that petitioner's raw verbal score was 28, indicating a verbal I.Q. of 71, and his raw performance score was 32, indicating a performance I.Q. of 77. She further explained that to get the full scale I.Q. one adds the raw verbal and raw performance scores together and then finds the corresponding score on the WAIS-R conversion chart. Zager than stated that when added together the raw score for petitioner was 60 and the I.Q. listed on the conversion chart for that score is 72 not 67. Finally, she testified that 72 does not indicate mental retardation but rather indicates borderline intellectual functioning.

## B. Hearing on Motion to Re-Open Post Conviction

### 1. Dr. Adler

According to an affidavit submitted by Dr. Adler and the testimony of Dr. Grant and Dr. Auble, it appears Dr. Adler re-tested petitioner in 1999, using the WAIS-III, and found petitioner had a full scale I.Q of 65.

**2. Dr. Grant**

Dr. Daniel Grant, a psychologist specializing in neuro deficiencies and traumatic stress disorders, testified that he evaluated petitioner on November 13th and 16th of 2003. He testified that, in his opinion, petitioner met the definition for mental retardation as set forth by Tenn. Code Ann. §39-13-203. He specifically stated that he found petitioner had significant subaverage intellectual functioning as indicated by an IQ of seventy or below; had significant deficits in adaptive behavior, and that this condition was manifested before the age of eighteen. Dr. Grant testified that his understanding of the Tennessee statute was based upon reference to the Diagnostic and Statistical Manual of Mental Disorders, Volume IV and the revised "TR" edition. He stated that under the DSM-VI and TR mental retardation is established by demonstrating an I.Q. from 70 to 75 or below. He explained that the DSM-VI and TR included I.Q.'s up to the range of 75 because the definition accounts for the statistical error of the measuring instrument. He further stated that the DSM-IV uses ten criteria to evaluate adaptive behavior:[5] social skills, communication, work, leisure, home living, functional academics and use within the community. A deficit in any two of the listed areas indicates a deficit in overall adaptive behavior.[6]

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[5] Dr. Grant explained that the actual criteria used by the DSM-IV originated with the American Association of Mental Retardation, Ninth Edition and was then accepted by the psychiatric manual.

[6] Dr. Grant further explained that the American Association of Mental Retardation's manual, Tenth Edition, 2002, defined mental retardation as a disability characterized by significant limitations of both intellectual functioning and adaptive behavior as expressed in conceptual, social and practical adaptive skills. To meet the criteria for

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Next, Dr. Grant testified regarding the specific testing performed on the petitioner. Initially, he testified about those tests designed to determine petitioner's intellectual functioning as it relates to the first prong of the statute. He stated that he administered the Wechsler Adult Intelligence Scale, Third Edition. (WAIS III) Dr. Grant testified that the petitioner's full scale I.Q. was 70; the performance portion of his I.Q. was 76; and his verbal portion of the I.Q. examine was 70.[7] He stated that he was aware that Dr. Adler had previously administered the WAIS III and the petitioner's full scale I.Q. score was 65; his verbal score was 67; and his performance score was 68. He also testified that he had reviewed the petitioner's data from the 1996 Wechsler Adult Intelligence Scale, Revised (WAIS-R), given by Dr. Adler in 1996. Dr. Grant testified that on the WAIS-R the petitioner's full scale I.Q. was 72, his verbal score was 71 and his performance score was 77. Dr. Grant testified that the petitioner's score on the WAIS-R, which is an older version of the Wechsler series than the WAIS III, was "inflated."[8] He stated that due to the age of the WAIS-R when it was administered the petitioner's

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mental retardation a person must have a level of intellectual functioning and adaptive functioning two standard deviations below the norm in at least one of the three broad skills categories and must exhibit these deficits before the age of eighteen. Finally, Dr. Grant indicated that he believed the Tennessee statute, the DSM-IV, and the A.A.M.R., Tenth Edition all provide a consistent definition for mental retardation.

[7] Dr. Grant explained that the full scale I.Q. is considered to be the most valid and most reliable of the three measures and should be considered as the score to be used.

[8] Dr. Grant explained that intelligent tests are periodically renormed because, with time, the population "gets better educated" and the scores "do not reflect their true ability level," because the scores show a higher score than the true ability level."

score should be adjusted downward by approximately three points. Thus, he contends petitioner's actual full scale score for the 1996 WAIS-R is 69. In addition to the Wechsler, Dr. Grant testified that he administered the Comprehensive Test of Non-Verbal Intelligence. (CTONI) He stated that, during the administration of this test, verbal communication is not utilized by either the test administrator or the subject. The petitioner's full scale I.Q. score for the CTONI test was 68, with a pictorial score of 68 and a geometric score of 72.

Next, Dr. Grant testified regarding the tests performed to evaluate petitioner's adaptive behavior. The first series of test in this category related to petitioner's language skills. Dr. Grant explained that communication is one of the criteria for evaluating adaptive behavior; thus, he administered several different measures of petitioner's language skills. He indicated that on the Peabody Picture Vocabulary Test, Third Edition, the petitioner exhibited severe deficits in receptive or hearing vocabulary; and the Expressive Vocabulary Test, the petitioner exhibited severe deficits in expressive vocabulary; on the Oral Written Language Scales (OWLS), the petitioner showed significant deficits in both comprehension and oral expression. When asked about the relevance of petitioner's social history and the fact that he was Vietnamese with limited English skills, Dr. Grant testified that many of these tests are administered without the use of language and further stated that he found impairments in both the petitioner's English and Vietnamese language skills. In fact, Dr. Grant stated that he believed the petitioner's Vietnamese was actually worse than the petitioner's English language skills. He stated that he agreed with Dr. Adler's overall assessment of the petitioner's language skills to be that of

a five-year-old child. Thus, Dr. Grant stated that the sum of the testing and evaluation indicated that petitioner had significantly low language skills and deficits in the area of communication.

With regard to the petitioner's academic skills, Dr. Grant testified that he performed the Kaufman Functional Academic Skills Test and the petitioner scored as follows: arithmetic, 93; reading, 66; and functional academics, 79. He also testified that he performed the Nelson Denny Reading Test, and stated the testing indicated that petitioner had a reading skills level at grade level 3.1; a spelling skills level at grade level 4.1; and an arithmetic skills level at grade level 7.4. He stated that this was consistent with school records. He also testified that such testing was supported by the fact that, while incarcerated, the petitioner has attended GED courses for eight to nine years and has not exceeded a grade level higher than 4.1.

Finally, Dr. Grant testified that he performed certain tests to determine petitioner's ability to live and function independently. Dr. Grant stated that he administered the Independent Living Scale and the petitioner received a score of 69, which indicated a significant deficit. Dr. Grant particularly highlighted the petitioner's low scores in the area of health and safety. Additionally, Dr. Grant testified that he reviewed the two Vineland Adaptive Behavior Scale tests administered by Dr. Adler. He explained that the Vineland is administered by interviewing someone familiar with the test subject to determine what that person thinks the test subject's performance level is for different tasks. The first Vineland was administered to the petitioner's mother and the petitioner received a score of 58. The second Vineland was administered to a member of the correctional staff at the prison where petitioner is

held. Petitioner scored 65 on the second Vineland. Dr. Grant testified that both scores are two standard deviations below the mean for adaptive behavior.

After reviewing all of the tests, Dr. Grant concluded that petitioner has significant deficits in adaptive behavior, which manifested in the developmental period. He further stated that his conclusion that the deficits developed during the developmental period was based in part on the Mr. Dinh's social history and highlighted the following facts, which he found relevant to that determination: the petitioner did not speak until the age of six; petitioner was not toilet trained until the age of five; petitioner did not do well in school and did not perform well in English as a Second Language courses; the petitioner has equal difficulty speaking his native language of Vietnamese; and the petitioner has difficulty living independently and, in fact, has never succeeded in living independently. Therefore, Dr. Grant concluded petitioner is mentally retarded.

On cross examination, Dr. Grant testified that even though he was aware that the petitioner, who is Vietnamese, did not come to the United States until the age of sixteen or seventeen, all of the tests he administered were given in English. With regard to the actual I.Q. test he administered to the petitioner, Dr. Grant admitted that the WAIS III may not be appropriate for Asians, but stated that because of the potential cultural bias of the WAIS III, he also gave the Comprehensive Test for Non Verbal Intelligence.

When asked about the tests for adaptive behavior, Dr. Grant stated that the Vineland test was administered to

the petitioner's mother even though she only speaks Vietnamese and may herself be mentally retarded. Nevertheless, on re-direct, Dr. Grant stated that the mother's impairment would not effect the score on the Vineland. However, he further admitted that the questions on the Living Scale were not adapted to apply to Vietnamese persons or persons who are incarcerated.

Finally, Dr. Grant was questioned about the effect of petitioner's schizophrenia on his I.Q., and he stated that schizophrenia could cause a person's I.Q. to drop over time. However, he argued that the petitioner had pre-existing neurological deficits and impairments that existed prior to the onset of schizophrenia exhibited throughout petitioner's childhood and exacerbated by the conditions of his early life. Dr. Grant stated that such conditions included seizures petitioner suffered during childhood, malnourishment, and a childhood injury to his head.

**2. Dr. Auble**

Dr. Auble, a neuro-psychologist, testified that she examined petitioner on November 19th and 26th of 2002. She stated that she conducted her own testing as well as reviewing previous testing done by Dr. Grant and Dr. Adler. Dr. Auble testified that in her opinion, petitioner met the criteria for mental retardation. With regard to the testing she actually performed, Dr. Auble stated that she gave petitioner the Halstead Reitan Battery and he showed impairment in four areas: tasks that measure frontal lobe functioning; language and verbal communication; memory testing; and motor speed. Dr. Auble explained that frontal lobe functioning involves the ability to adapt to new situations, to modify one's behavior, and the

ability to switch from one idea to the next. To determine petitioner's language and verbal communication skills, Dr. Auble performed the Boston Diagnostic Aphasia Exam and found petitioner was unable to understand short stories. She also stated that she gave petitioner a memory test, and testified that the petitioner scored significantly lower than expected.

Initially, with regard to actual I.Q. testing, Dr. Auble stated that she reviewed the 1996 and 1999 test administered by Dr. Adler; the 2002 WAIS-III done by Dr. Grant and Dr. Grant's CTONI exam. In discussing the WAIS-III, she acknowledged that the Wechsler was not normed on the Asian population, but went further than Dr. Grant in stating that this fact had no effect on the petitioner's scores. In expounding on this position, Dr. Auble explained that because there is no information on the Wechsler series regarding Asian American groups, the examiner must looked to the sub-tests to determine the validity of the I.Q. tests. She testified that she found there is heavy American cultural loading on the information sub-test. She stated that petitioner's score on that sub-test was below-average, but was higher than eleven of the twelve other sub-tests, which indicated to her that petitioner was not performing less well on questions that have a heavy cultural loading. Additionally, Dr. Auble asserted that this conclusion is supported by looking at the CTONI, a non-verbal test and one designed to be given to individuals from different cultures. She found petitioner's performance on the CTONI further indicated that petitioner has significantly low intellectual functioning. Additionally, Dr. Auble testified that the petition's I.Q. score is not lowered by the fact that the test was given in English versus Vietnamese, because petitioner's primary language is not

Vietnamese. She testified that Dr. Wasserman, who is fluent in both English and Vietnamese, evaluated the petitioner to determine in which language petitioner was more proficient and found that petitioner was more proficient in English. She further stated that this evaluation was supported by both a Vietnamese guard at the prison and Doan Dinh, both of whom stated that petitioner's comprehension and verbal expression of Vietnamese was limited.

Dr. Auble also disputed Dr. Grant's assertion that the petitioner's schizophrenia could have affected his I.Q. She stated that on those sub-tests, which test for concentration, petitioner did not score lower than other sub-tests, and in fact his highest score was on the symbol search subtest, which is a primary measure of one's ability to pay attention or concentrate. Moreover, she testified that the research indicates that rather than developing after the onset of the disease, neurological deficits are typically present many years before the onset of schizophrenia. She found this was particularly true for petitioner, who had considerable language deficits early in childhood.

Next, Dr. Auble discussed her evaluation of petitioner with regard to determining deficits in adaptive behavior. She stated that she reviewed the testing done by both Dr. Grant and Dr. Adler as well as petitioner's's social history. Dr. Auble testified that, using the DSM-IV categories, she found deficits in five areas: communication; functional academics; self-direction; health and safety; and social interpersonal. With relation to the AAMR (10th Edition) categories, she stated petitioner presented deficits in the areas of conceptual, social and practical.

Finally, Dr. Auble testified that she found petitioner's deficits were manifested during the developmental period. She emphasized the following AAMR list of risk factors for mental retardation which were present in petitioner's developmental stage: petitioner's mother was poor during the pre-natal period and was malnourished during the pregnancy; petitioner's mother received no pre-natal care and suffered some injury during pregnancy; petitioner's mother smoked approximately a half a pack of cigarettes a day during her pregnancy; petitioner's mother has a diminished I.Q.; petitioner received no early childhood medical treatment; petitioner was malnourished; petitioner suffered seizures and other frequent illness during childhood; petitioner suffered a traumatic brain injury; petitioner's post-natal socialization was poor; petitioner was impoverished, homeless and lacked adequate stimulation; petitioner has only two and a half years of formal education; and petitioner was neglected and abused during the formative years. She explained that these factors manifested themselves in the form of early childhood neurological deficits as evidenced by the fact that petitioner did not speak until he was six years old and when he did begin to speak his speech was abnormal and his articulation was poor.

On cross-examination, Dr. Auble acknowledged that petitioner did not come to America until he was seventeen and before that he had lived on the street in Vietnam. She also acknowledged that once in America he received only one year of English training before leaving school and no I.Q. testing was done before the age of eighteen. She also stated that she was aware of Ms. Mitchell's testimony at trial regarding the petitioner's ability to cook for the family and care for Ms. Mitchell's children. Dr. Auble

stated that she was also aware that petitioner had held a job. With regard to the 72 I.Q. score on the original 1996 test performed by Dr. Adler, Dr. Auble essentially stated that Dr. Adler had given the wrong test. She explained that the WAIS-R was given at the end of the normative period; thus, petitioner's scores would have automatically drifted upward by two to three points. She stated that she believed petitioner's true score for that test was 69. Next, Dr. Auble admitted that petitioner was not tested until approximately ten years after his arrest, and stated that the adaptive behavior testing was not designed for incarcerated individuals. Finally, Dr. Auble stated that she could not positively say when, or even if, petitioner suffered from a traumatic brain injury.

## STANDARD FOR REVIEWING CLAIMS OF MENTAL RETARDATION

### A. *Heck Van Tran v. State of Tennessee*, 66 S.W.3d 790 (Tenn. 2001)

In remanding this case to the trial court, the Tennessee Supreme Court found that the execution of mentally retarded individuals fails to achieve legitimate penological objectives for punishment as required under the United States and Tennessee Constitutions. *Van Tran*, 66 S.W.2d at 809. Therefore, the Court found the execution of the mentally retarded is prohibited and further found that their holding warranted retroactive application to cases on collateral review. *Id.* at 811. The Court further reasoned that, given their holding and the unique circumstances of the petitioner's case, fundamental fairness applied to give petitioner an opportunity to litigate the issue of his mental status. Having so found, the Court remanded the case to

the trial court for determination as to the mental retardation of petitioner. On remand, the Court instructed the trial court to apply the applicable criteria set forth by Tenn. Code. Ann. § 39-13-203 in determining whether petitioner is mentally retarded.

**B. Tennessee Code Annotated §39-13-203**

Tenn. Code Ann. §39-13-203(b) precludes a sentence of death for petitioner's with mental retardation. Part (a) of the statute defines mental retardation as significantly subaverage general intellectual functioning as evidenced by (1) a functional intelligence quotient (I.Q.) or seventy (70) or below; (2) deficits in adaptive behavior; and (3) evidence that the mental retardation manifested during the developmental period, or by age eighteen (18). Part (c) of the statute places the burden of "production and persuasion to demonstrate mental retardation by a preponderance of the evidence" upon the petitioner.

**C. *Michael Wayne Howell v. State of Tennessee*, No. W2003-01056-SC-R11-PD (filed November 16, 2004 at Jackson)**

Subsequent to the remand and hearing of this matter, but prior to this court's decision, the Supreme Court reiterated the standard for determining mental retardation and declined to extend the definition set forth in the statute to include a general I.Q. "range." *Michael Wayne Howell v. State of Tennessee*, No. W2003-01056-SC-R11-PD (filed November 16, 2004 at Jackson). In *Howell*, the Court concluded that the language of the statute was "perfectly clear and unambiguous." The Court noted that the statute "makes no reference to a standard error in the

test scores nor consideration of any range of scores above the score of seventy;" and, thus, declined to "read in" any such provisions. *Id.* at *7. With regard to which test or testing method is to be used, the Court found that the statute did not provide a "clear directive." *Id.* at *9. While the Court acknowledged that the WAIS-III test has been called "'the standard instrument in the United States for assessing intellectual functioning,'" the Court finds there is nothing in the legislative record to indicate that other tests are not also accurate I.Q. tests. *Howell*, at *9 quoting, *Atkins v. Virginia*, 536 U.S. 304 at n.5, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). Thus, the Court held that a trial court may give more weight to one test, "but should do so only after fully analyzing and considering all evidence presented." *Id.* Finally, the Court made clear that a petitioner, who could not have litigated their claim of mental retardation at an earlier proceeding, will have the opportunity, at an evidentiary hearing, to prove mental retardation by a *preponderance of the evidence*, in accordance with the procedure set forth by Tenn. Code. Ann. § 39-13-203(c). *Id.* at *14 and *15 (emphasis added).

Thus, based on the above, for purposes of this proceeding, the court must determine whether petitioner has established, *by a preponderance of the evidence*, that (1) he has significant subaverage intellectual functioning evidenced by a functional intelligence quotient of seventy or below; (2) he suffers from deficits in adaptive behavior and (3) the deficits in both I.Q. and adaptive behavior developed prior to the age of eighteen. *See Van Tran*, 66 S.W.3d 790, 812, applying Tenn. Code Ann. § 39-13-203; *Michael Wayne Howell v. State of Tennessee*, No. W2003-01056-SC-R11-PD (filed November 16, 2004 at Jackson).

## ANALYSIS

This court will evaluate each of the "elements" of mental retardation independently to determine whether petitioner has met his burden with respect to each prong of the statute. As an initial commentary to this inquiry, this court notes the difficulty of making that determination in this case, due to the unique circumstances of the petitioner's background. Petitioner speaks very little English; has little formal education; for much of his young life lived on the streets of Vietnam; for most of his adult life has been incarcerated; and, in addition to allegation that he is mentally retarded, suffers from paranoid schizophrenia. Thus, this court's examination of the evidence is certainly effected by a belief that the typical testing used to determine a person's level of intellectual functioning, may be ill equipped to deal with the many unique circumstances associated with petitioner's background. For that reason, in addition to traditional challenges made to claims of mental retardation, this court finds the State's challenges to the validity of some of this testing performed in this case is both appropriate and legitimate. However, this court further notes that, while vigorously challenging petitioner's witnesses on the administration of the testing and the effects of each unique circumstances upon the validity of the tests, the State offered no independent expert proof to directly challenge the efficacy of the tests performed or validity of their results. Thus, although expressing reservations about the many circumstances that could have effected the testing in this case, this court, nonetheless, finds petitioner has demonstrated by a preponderance of the evidence that he has significantly subaverage general intellectual functioning as evidence by a functional intelligence quoting (I.Q.) of seventy (70) or

below. However, this court does not find petitioner has established that he suffers from deficits in adaptive behavior.

## A. Functional Intelligence Quotient of Seventy or Below

This court finds that the petitioner has proven by a preponderance of the evidence that he has a functional intelligence quotient of seventy (70) or below. The 1996 WAIS-R, performed by Dr. Adler, indicated the petitioner had an I.Q. of 72.[9] Additionally this court heard testimony from Dr. Auble and Dr. Grant that the WAIS-R administered by Dr. Adler was given at the end of the normative period; and because of that the score actually reflects an I.Q. two to three points lower than 72, placing the petitioner's score within the guidelines of the statute.[10] However, finding this type of argument to be of the same nature as the kind of speculation represented by the "range" of I.Q. argument rejected by *Howell*, this court

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[9] Dr. Adler testified at the original post-conviction hearing that the petitioner's score for the WAIS-R was 69. However, Dr. Zager, testified that Dr. Adler had incorrectly scored the raw data, and in fact the petitioner's actual score was 72. Despite the discrepancy in testimony, this court notes that at least one Appellate Court seems to have accepted Dr. Zager's testimony. *See Heck Van Tran v. State*, No. 02C01-9803-CR-00078 (Tenn. Crim. App. filed April 1, 1999 at Jackson), 1999 Tenn. Crim. App. LEXIS 307, *15-16.

[10] While this court will not speculate, beyond the proof in the record, as to Dr. Adler's reasons for testifying as he did at the original post-conviction hearing, this court notes that a three point adjustment for the upward "drift" could explain the fact that Dr. Adler testified that the petitioner's score was 69, despite the fact that Dr. Zager testified that the appropriate scoring of the data indicated a score of 72. Nonetheless, for purposes of this hearing, the court will consider the I.Q. score for the testing done by Dr. Adler to be 72.

does not accept petitioner's argument and will not consider any score other than the actual score of 72 to be a valid assessment of the 1996 WAIS-R. Despite the petitioner's argument and the testimony of Dr. Auble and Dr. Grant that the 1996 WAIS-R score is actually lower due to an upward "drift", this court finds, under *Howell*, that the appropriate approach is to consider the actual full scale intelligence quotient as measured by the testing data, irregardless of speculation as to the effect of the testing date. Thus, based on the original test performed by Dr. Adler, petitioner does not meet the first criteria of Tenn. Code Ann. § 39-13-203(a). However, because additional testing indicates petitioner's I.Q. is below 70, the court's inquiry does not end here.

In 1999, Dr. Adler again administered testing. This time Dr. Adler administered the newer version of the Wechsler series, the WAIS-III, and found petitioner had an IQ of 65. Additionally, Dr. Grant also did I.Q. testing, independent of that done by Dr. Adler. In November of 2002, Dr. Grant performed the WAIS-III and the CTONI. Petitioner's score on the 2002 WAIS-III was 70 and on the 2002 CTONI petitioner's score was 68.

> Thus, to recap, the court was presented with evidence of the following I.Q. testing:
>
> 1996 Dr. Adler – WAIS-R: petitioner scored 72
>
> 1999 Dr. Adler – WAIS-III: petitioner scored 65
>
> 2002 Dr. Grant – WAIS-III: petitioner scored 70
>
> 2002 Dr. Grant – CTONI: petitioner scored 68

For the previously stated reasons, this court accepts petitioner's 1996 WAIS-R score as being an unrevised 72.

However, how the court uses that testing in its determination of whether petitioner has significant subaverage general intellectual functioning is a different issue. Due to the testimony regarding the potential for error, this court gives little weight to that evidence. Even though this court finds it appropriate to evaluate the petitioner's motion using a score of 72 for the 1996 WAIS-R, for purposes of evaluating the weight to be given to this evidence, the court can not ignore the testimony of Dr. Grant and Auble concerning the possibility of error based upon the age of the test. The weight of the contested test is especially relevant, in light of the other evidence produced at the hearing. Had this been the only evidence produced, this court likely would have been compelled to say that the petitioner simply failed to meet the first prong of mental retardation, in that he does not have an I.Q. of seventy or below. However, since the petitioner produced additional proof indicating that he does have an I.Q. of seventy or below, this court finds it can not say that the 1996 test automatically precludes petitioner from meeting his burden of proof. In fact, this court finds the bulk of the proof mandates a contrary conclusion. All three subsequent I.Q. test scores meet the requirements of Tenn. Code Ann. § 39-13-203(a)(1).

The State argues that the lower scores are the result of the petitioner's poor English skills and social history, and the fact that petitioner suffers from schizophrenia. Admittedly, both petitioner's English and Vietnamese skills are poor. However, with regard to petitioner's poor language skills, Dr. Grant, Dr. Auble, Doan Dinh and the Vietnamese guard at the prison all stated that the petitioner's English was better than his Vietnamese. Regardless, Dr. Grant performed the nonverbal CTONI test to be

sure that the petitioner's WAIS-III score was accurate, and in fact the petitioner scored even lower on the CTONI. Additionally, while Dr. Auble admitted that the WAIS-III was not normed on the Asian population, she testified that the petitioner's score would not be lowered due to that fact. Dr. Auble explained that by looking at the certain subtests of the WAIS-III that are "culturally loaded," she could evaluate whether the petitioner's score was effected by this factor. She then testified that even though the petitioner's score on those subtests, which were heavily culturally loaded, was below average, the scores for those subtests were higher than eleven of the twelve other subtests. Thus, Dr. Auble concluded that petitioner was not performing less well on the questions that have cultural loading. Dr. Auble also indicated that the petitioner's score on the CTONI, a nonverbal test, which does have normative data for Asian individuals, was lower than the 2002 WAIS-III test, indicating that the petitioner was not affected by any cultural loading on the WAIS-III test.

The more complicated issue is the State's assertion that petitioner's I.Q. is effected by the fact that he suffers from paranoid schizophrenia. At the original post-conviction hearing, Dr. Kenner, a child psychologist, testified that petitioner suffered from chronic, severe, paranoid schizophrenia. He stated that schizophrenia has an impact on a person's ability to think rationally. Moreover, Dr. Kenner testified that the residual effects upon a person afflicted with schizophrenia include cognitive impairment. He stated that the longer the individual goes untreated, the higher the cognitive impairment. According to Dr. Kenner, petitioner may have been suffering from onset of the disease as early as 1989, but was not diagnosed and did not begin treatment until 1997. Thus,

petitioner suffered from the disease for almost eight years prior to the first I.Q. test being administered.

Similarly, at the hearing on the Motion to Reopen Post-Conviction, Dr. Grant testified that schizophrenia may cause a person's I.Q. to drop over time. However, Dr. Grant contends petitioner suffered significant neurological incidents as a child which preceded the onset of schizophrenia, including childhood seizures, malnourishment and a childhood injury to his head. Thus, he found that this trauma combined with the fact that petitioner seemed to suffer neurological deficits and impairments in early childhood, indicated that his mental functioning was effected long before he developed schizophrenia. Additionally, Dr. Auble testified that, in her professional opinion, the fact that petitioner suffered from schizophrenia would not have lowered his I.Q. In support of her assertion, she explained that in examining the petitioner's WAIS-III scores she found that petitioner did not score lower on the subtests of the WAIS-III which measure concentration and attention to detail, areas which would normally be effected by schizophrenia. Dr. Auble expressed the opinion that, if the petitioner received proper treatment his scores from the point of treatment, forward would certainly not decline, but rather his full range I.Q. could improve slightly.

Neither party disputes that petitioner suffers from paranoid schizophrenia; and, while this court accepts Dr. Kenner's assertion that the disease has the potential to effect cognitive functioning, it is unwilling to speculate about the nature and degree of any such effect on petitioner. Clearly, petitioner suffered from the disease for several years before receiving treatment. Dr. Kenner testified that petitioner began to show signs of the disease in 1989, but did not receive treatment until almost eight

years later. Moreover, by the time petitioner was tested by Dr. Grant, he had been suffering from schizophrenia for almost twelve years. Thus, despite Dr. Grant and Dr. Auble's assertions to the contrary, the court finds that the fact that petitioner suffers from schizophrenia to be significant. However, based on the limited testimony regarding this issue, this court simply can not say with any degree of certainty what if any specific effect this condition directly had on petitioner's intellectual functioning. More importantly, this court finds that, for purposes of evaluating the first prong of the statute, the effect, if any, of the schizophrenia on petitioner's I.Q. is inconsequential. The first prong of the statute, merely requires petitioner demonstrate that he has significant subaverage general intellectual functioning as evidenced by an I.Q. of 70 or below. Specifically, section (a)(1) does not inquire into the issue of when the deficits developed, that is an issue to be evaluated under part (a)(3) of the statute. Essentially, for purposes of part (a)(1), either petitioner has an I.Q. of seventy (70) or below or he does not. If some factor or affliction, other than mental retardation, accounts for his below average I.Q. scores; then it will become evident when evaluating the second and third prong of the statute, in that, petitioner will be unable to demonstrate that he has deficits in adaptive behavior and/or that any deficits under part (a)(1) and/or (a)(2) manifested prior to the age of eighteen.

Thus, despite the State's argument regarding the validity of the I.Q. testing, given the fact that petitioner has produced testimony indicating that on three separate I.Q. tests he scored seventy (70) or below, this court finds petitioner has met his burden with respect to the first prong of Tenn. Code. Ann. § 39-13-203.

**B. Significant Deficits in Adaptive Behavior:**

Despite the testimony from petitioner's experts, this court finds petitioner does not have deficits in adaptive behavior. The DSM-IV defines adaptive behavior using a set of ten criteria, as adopted from the Manual of the American Association of Mental Retardation, 9th Edition. The ten criteria listed for consideration include: social interpersonal skills, communication, self-direction, work, leisure, home living, functional academics, self-care, health and safety, and use of community resources. In order to have significant deficits in adaptive behavior, a person must demonstrate deficits in at least two of these areas.

Dr. Grant stated that he performed several different tests to evaluate petitioner's adaptive behavior. First, he stated that he administered several different measures of language including the Peabody Picture Vocabulary Test, 3rd Ed; Expressive Vocabulary Test; and the Oral Written Language Scales (OWLS). Petitioner scored a 53 on the Peabody Vocabulary test which indicates severe deficits in receptive or hearing vocabulary. On the Expressive Vocabulary Test, petitioner received below 40, which is the lowest normed score, demonstrating significant deficits in expressive vocabulary. Petitioner's OWLS examination consisted of two components, the list comprehension and the oral expression. Petitioner scored 68 and 62, respectively, both indicating significant deficits. Additionally, Dr. Grant testified that the social history prepared as part of Dr. Adler's examination indicated that petitioner had the language skills of a five-year-old. He also stated that he reviewed the Clinical Evaluation of Language Fundamentals (CELF) performed by Dr. Adler and found petitioner's score for both receptive and expressive language to

be 50 or below. Dr. Grant stated that the CELF score is consistent with petitioner's scores on the Peabody Picture Vocabulary Test and the Expressive Vocabulary Test. Thus, Dr. Grant found petitioner had significant deficits in the area of communication, one of the criteria for evaluating adaptive behavior.

Dr. Grant then attempted to assess petitioner's academic skills. He began by reviewing the Kaufman Functional Academic Skills Test, and found petitioner's arithmetic score was 93, his reading score was 66. Thus, his functional academic score was 79. He then stated that the petitioner's score on the Nelson Denny Reading Test was 4.1 or approximately the 4th grade level. Dr. Grant also stated that petitioner's wide range achievement test indicated a reading grade level of 3.1; a spelling grade level of 4.1; and an arithmetic grade level of 7.4. He stated that even after eight to nine years of GED courses petitioner is still unable to score above a 4.1 grade level in reading. Thus, Dr. Grant found petitioner also had deficits in the area of functional academics.

Finally, Dr. Grant administered an Independent Living Scale and reviewed Dr. Adler's administration of the Vineland Adaptive Behavior Scale. Dr. Grant explained that the Independent Living Scale was designed to determine if a person has the ability to live and function independently. He found petitioner had a score of 69, which indicates a deficit. Next he explained that the Vineland was administered by interviewing someone very familiar with the individual being evaluated, to see what they think the individual's performance level is for different tasks. He testified that Dr. Alder administered the Vineland to the petitioner's mother and to a member of the

prison's correctional staff. The score given by petitioner's mother was 58 and the score given by the correctional officer was 65. Dr. Grant testified that both scores are two standard deviations below the mean for adaptive behavior. Dr. Grant stated that the petitioner had particularly low scores in the area of health and safety, and he found that overall the petitioner had never succeeded in living independently. Thus, having found petitioner has deficits in communication; functional academics; and independent living, three of the ten criteria for assessing adaptive behavior, Dr. Grant's ultimate conclusion was that the petitioner suffered from significant deficits in adaptive behavior.

Next Dr. Auble testified that she performed the Halstead Reitan Battery, which measures how impaired a person is over a series of tests. She explained that the test ranges from 0 to 1, with higher scores indicating more impairment, and the petitioner's score was .9. Thus, she stated the petitioner is close to "as bad as it gets and is in the impaired range." Looking at the individual tests, she found the petitioner had deficits in four specific areas. First, she found he had deficits in the tests which measure frontal lobe functioning, such as the ability to adapt to new situations; modify behavior; and switch from one idea to the next. Specifically, Dr. Auble testified that petitioner was impaired on tests that involved him figuring out the meaning of a new word by giving him examples of that word in a different context; a 20 questions test where the subject is given a number of pictures on a page and they have to figure out which picture is the target of the tester's thoughts by asking specific yes and no questions. The next area in which she found petitioner had deficits was language and verbal communication. She stated that on

the Boston Naming Test, the petitioner had trouble coming up with a word even when he understood the word and also stated that on the Boston Diagnostic Aphasia Exam the petitioner was unable to understand short stories. Third, Dr. Auble found deficits on those tests designed to evaluate memory; and the fourth area of deficits involved tasks designed to test motor speed. Thus, with regard to the AAMR criteria, she found petitioner has significant deficits in five areas of adaptive behavior: communication, functional academics, self-direction, health and safety and social interpersonal skills.

The State not only challenges the conclusions of Dr. Grant and Auble based upon certain aspects of the petitioner's past, but also argues that the tests performed to determine adaptive functioning are inappropriate for individuals who have been incarcerated for as long as the petitioner. To contradict the findings of Dr. Grant and Dr. Auble, the State points to the testimony of Ms. Mitchell, the petitioner's sponsor, who testified at trial that petitioner cooked for her and her children and cared for the children when she was ill, including a child that suffered from cerebral palsy. Additionally, the State notes that the petitioner was able to maintain employment and was even promoted to a job with additional responsibilities. Moreover, the State argues that because petitioner has been in jail for approximately fifteen years, the tests conducted by Dr. Auble and Dr. Grant do not accurately reflect the level of his adaptive behavior. In addition, the State argues that even his upbringing in Vietnam, prior to his incarceration, would not lend itself to the type of evaluation performed by Dr. Auble and Dr. Grant.

Specifically, on cross examination of Dr. Grant, the State challenged the types of tasks used in the Independent Living Scale. The following is the colloquy between Assistant District Attorney Campbell and Dr. Grant:

Campbell: . . . the last testing you talked about the independent living scale. What is the managing money component of that?

Dr. Grant: Well, it's like you give him – if you buy something that cost $1.32 and you gave him $5.00 how much change would he get back. Different types of tests like that. One was writing a check, or a money order.

Campbell: Do you know if he ever filled out a check, or a money order?

Dr. Grant: Probably not.

Campbell: Managing home and transportation, what kind of questions involve that?

Dr. Grant: Managing home would be, if you're in your home and the lights go out, what would you do? Or, if you smelled gas in your house, what would you do? Those kinds of tasks. If you had something that needed repaired, how would you go about getting your repairs done.

Campbell: What about, you said, health and safety scores. You said that was his lowest score. What does that involve?

Dr. Grant: For instance, if you were having chest pains, what would you do? If you lost ten pounds in three or four weeks and your

not trying to loose weight, then what should you do? If you hear somebody knock on your door at 10:00 o'clock at night and you're not expecting anyone, what should you do? These are not exact, by [sic] it's just kind of a general idea of what they are on this.

Campbell: You don't take into account the fact that Mr. Van Tran's life, for the most part, that wouldn't be, really, part of his upbringing, or his life-style? Any of those things we've talked about. When he was in Vietnam and certainly when he was in prison.

Dr. Grant: I'm not sure what –

Campbell: What I mean is, that all of these things that you talk about, about these – I'm going to say, lifestyle questions, but for the bulk of his life they really didn't have the same impact they would have on somebody that was raised in this country, or was not incarcerated?

Dr. Grant: I'm sorry, I'm still not –

Campbell: Okay. Well, do you think Vietnam if you asked him a question, "What do you do if you smell gas?", if people don't have gas in their houses, do you think they would be able to answer that the same way someone living in the city in this country would?

Dr. Grant: No, but they may have some other flammable, like kerosene. They'd be using mostly kerosene, or something like that. But, you would adapt – I wouldn't –

Campbell: Well, were these questions for Vietnamese persons?

Dr. Grant: No.

Campbell: And the bulk of the time he's been in America he's been incarcerated?

Dr. Grant: That's correct. He's also been going to school for nine of those years.

Campbell: In the prison?

Dr. Grant: In the prison.

*Motion to Reopen Post Conviction Proceedings, Transcript of Evidence – September 18, 2003; pages 55-57.*

Again, on cross examination of Dr. Auble, the State challenged the efficacy of the Independent Living Scale as it applies to the petitioner. The following exchange occurred:

Campbell: [T]hat testing is not designed for incarcerated individuals. That's for people in general, right?

Dr. Auble: It's for people in general. And they're told to pretend for the purposes of the tests that they are living on their own. And so the questions are designed to see what they would do given that situation.

Campbell: Okay. So he's asked to pretend like he's living in a world that he only lived in for three years?

Dr. Auble: Well, I'm not sure he ever really lived on his own.

Campbell: What I'm talking about though is in the free world. I guess the unincarcerated

world, he's asked to pretend that he's living in that world. In that world, he only lived in for three years?

Dr. Auble: Yes. . . .

Campbell: Well, Doctor, is it designed for people who are living on the street of Vietnam? Was Vietnamese refugees, was it drafted for those kind of people? What kind of questions are asked on that test?

Dr. Auble: Let me tell the questions that were asked.

Campbell: Okay.

Dr. Auble: And I'll tell you the ones he got right and the ones he didn't get right. He's asked to show how he calls the police on the phone, and he does that correctly. He's asked if you didn't have a regular doctor and you needed medical help quickly, how could you get it? And he answers – he does that correctly. He says to dial 911. He says – there was a question about suppose you were outside in your yard and you saw smoke coming out of the kitchen window what would you do? He gives a partial answer on that. The full answer would be to assess the severity of the situation and then take appropriate measures. He would say he would simply dial 911. He's asked –

Campbell: Is that considering right or wrong?

Dr. Auble: He gets one point instead of two points.

Campbell: Okay.

Dr. Auble: Suppose you are home alone and not expecting anyone, there is a knock at the door at about ten o'clock at night, what would you do? He said that he would ask who was it and not open the door. And that's an appropriate answer. He get two points.

Campbell: Okay.

Dr. Auble: He's asked what are two precautions you can take to protect yourself when your going out at night? He's not able to answer that at all. He doesn't provide any answer. He's questioned about it and questioned about it. He provides no answer. He's asked, tell me two ways you would know that it's safe to cross a busy street. And he's able to answer that. He gets full credit for that. He says to look both ways and push the button on the street sign. He's asked if you had pain in your chest on your left side and you were having trouble breathing, what would you do? And he says – he gets full credit. Basically he says to call 911. He's asked, suppose you smelled gas odor in the house what would you do? He says he would call a gas station and tell them you smell gas. He gets one point for that.

Campbell: You don't know whether he's ever had a house with a gas line, do you?

Dr. Auble: I don't know if he's had a house that had gas heat. I suspect he had to cook on something when he was living in Vietnam that probably involves kerosene or something. But I don't know for sure.

However, he gets a point for it. He's able to answer it whether he did or not. If you accidently cut your hand and it was bleeding very badly, what would you do? He does not get credit for that. The correct answer is to seek, you know, some kind of medical attention.

Campbell: What did he answer?

Dr. Auble: I can't read it all. Something about a bag. I think he says to wash it. But it's not sufficient to get credit. Tell me three things that are important for you to do to take care of your body. And he is able to give a partial answer on that involving hygiene, taking a shower. And he gets one point for that. Two things about the condition of your health during the past five years. And he's able to say something about how he doesn't get exercise and something else. He gets one point for that. If you unintentionally lost ten pounds in four weeks what would you do? The correct answer is to seek some sort of attention or, you know, try to figure out why this was happening, go to the doctor. And he just said he would be happy. It was explained and repeated and he want's able to answer. Let's suppose you have to take medication three times a day. How would you remember when to take it? He would put it in his pocket and take it with you, which is not an adequate answer. Why is it important to know about the side effects of the medication you are taking? He isn't able to answer that. Tell me two reasons why bathing is important. He

> gets a point for that. Apparently he answers keep yourself clean. There's some more of this. I think they're not in order. He's asked to tell two safety precautions you can take when bathing or showering. He doesn't say any. I mean, he doesn't tell any safety precautions. He says wash you hair and clean your ears, clean your body. So he doesn't get credit for that. What would you do if you couldn't hear most conversations? He's not able to come up with any answer for that. What would you do if you could not read small print like the print in the phone book or on the labels of medicine bottles? He says to see the eye doctor. He gets two points for that. That's a good answer. Suppose you injured your hip and the doctor told you it would take much effort and months of physical therapy to be able to walk again. What would you do? He says he would listen to him and do what it takes. And, again, that's a good answer. He gets two points. What are two dangers of staying in bed all the time? And he gets one point for that. So that – those are his answers to it. They add up to a score of 20, which works out to be a standard score of 55.

*Motion to Reopen Post Conviction Proceedings, Transcript of the Evidence February 26, 2004; pages 66-70.*

Initially, this court notes its agreement with the State's assessment that, due to the unique circumstances of the petitioner's background, some of the questions posed on the independent Living Scale border on the absurd.

Additionally, this court notes the testimony of Dr. Grant on re-direct examination, in which he testified that, the three years the petitioner spent in this country as a free person would be sufficient for him to learn some of the skills that are measured by the Independent Living Scale, but certainly not all of them. Moreover, the fact that the petitioner had been incarcerated for more than ten years when these tests were administered certainly effect their efficacy. Thus, despite the assertions of Dr. Auble and Dr. Grant's, this court is convinced by the State's cross examination of the expert witnesses and arguments of counsel, that the Independent Living Scale should be given limited weight in this case. Therefore, in evaluating whether petitioner has met his burden, with respect to the second prong of the statutory definition, this court gives little credit to his below average score on the Independent Living Scale.

Next, the State contests the efficacy of the Vineland. With regard to the test administered to the petitioner's mother, the State argues that because the mother is potentially mentally retarded herself; for much of her life lived on the streets of Vietnam; has limited, if any, formal education; and still does not speak English; her answers to the Vineland questions are suspect. Additionally, the State argues that, due to the petitioner's incarceration, it is impossible for the subjects to give accurate answers about the petitioner's potential skill levels for certain tasks. While, both Dr. Auble and Dr. Grant discount this argument, this court again finds the State's argument persuasive. Again, due to the unique circumstances of this case, this court gives the Vineland testing little weight. Due to the circumstances of this case, like the Independent Living Scale, there are inherent problems

with the administration of the Vineland. Participants are asked to evaluate the petitioner as if he were a free and functioning member of this society and as if the petitioner were seventeen years old. With regard to the petitioner's mother, she herself is barley a functioning member of this society and has not seen her son on a consistent basis for almost fifteen years. She is likely very unfamiliar with many of the tasks listed in the Vineland. Additionally, once she and the petitioner came to the United States they were only living together for a short time; thus, she had very little opportunity to observe the petitioner in a "traditional" setting. Therefore, this court finds the Vineland conducted with petitioner's mother should be given very little, if any, weight. The Vineland was also administered to a Vietnamese prison guard at the facility where petitioner is being held. The court finds the efficacy of this test to be questionable as well. When the test was administered, the petitioner had been incarcerated for over ten years. Petitioner is incarcerated in a manner that severely restricts his activities and in a manner that provides a strictly controlled environment. In other words, little is left to the petitioner's discretion. He is not required to cook for himself; he is told when and how much medicine to take; he is given medical treatment when needed, without request; he is provided facilities and opportunities for attending to his personal hygiene. All of these areas are areas covered by the Vineland, yet in this case, the petitioner has lived in an environment for over ten years where he does not have to do anything for himself. Moreover, the prison guard has never observed petitioner in any other environment. Therefore, the court also finds little weight should be given to the Vineland administered to the prison guard.

Despite the court's findings with respect to both the Vineland and the Independent Living Scale, the court recognizes that in addition to these two questionable assessments both Dr. Grant and Dr. Auble conducted extensive testing with regard to adaptive behavior. However, after reviewing the testimony of the two Doctors relating to the additional testing, this court finds petitioner still fails to meet his burden under the second prong of the statute. While, the court does find that there is overwhelming proof that the petitioner suffers from deficits in the area of communication, of the ten AAMR criteria, this is the only area in which the court finds there to be deficits.

Petitioner's deficits in the area of communication are evidenced not only by his performance on the Peabody Picture Vocabulary Test, the Expressive Vocabulary Test, the OWLS, the Nelson Denny Reading Test, the Boston Naming Test and Boston Diagnostic Aphasia Exam, but also by the reported deficits in his language skills in early childhood and his continued inability to perform higher than a 4.1 grade level on the reading portion of the G.E.D. testing.

However, with regard to the remaining criteria, this court finds no deficits. Despite Dr. Auble's testimony that petitioner's frontal lobe functioning indicates deficits in the areas of self-direction and social interpersonal skills, this court does not find deficits in these areas. Dr. Auble testified that she found the petitioner was mentally rigid and unable to adapt to new situations or modify his behavior. However, the specific testing which was used by Dr. Auble to evaluate these areas again related to certain language skills; such as petitioner's ability to figure out the meaning of new words. Thus, the results of these tests

were likely skewed by the fact that petitioner has a limited grasp of the English language.

The assertion that petitioner has deficits in the areas of self-direction and social skills is further contradicted by testimony at petitioner's trial. At the trial, petitioner's sponsor, Ms. Mitchell, testified that petitioner cared for her while she was ill; cooked for her family and even cared for her children, including a child who suffers from cerebral palsy. *See State v. Van Tran*, 864 S.W.2d 465, 485 (*dissenting opinion*). Testimony at trial also indicated that petitioner was able to hold a job and was even promoted to a job with more responsibility. *Id.* In fact, petitioner's employer specifically stated that petitioner was a "responsible" employee. *Id.* Additionally, after the murders, petitioner fled the city and evaded arrest for six months; and testimony at trial indicated it was the petitioner who negotiated the sale for the stolen gold and split up the proceeds amongst his co-defendants. *Id.* at 469. Moreover, any mental rigidity or ability to adapt could just as likely be attributable to cognitive dysfunction associated with petitioner's schizophrenia or treatment he is receiving for that condition.

Although, Dr. Auble also found petitioner demonstrated deficits in the area of health and safety, it appears she based this assessment largely upon the Independent Living Scale. As previously indicated, under the circumstances of this case, the court accredits little weight to the Independent Living Scale. Additionally, it is obvious to this court that, while homeless and living on the streets of Vietnam as well as while incarcerated, petitioner has had little opportunity to develop or refine the skills associated with this criteria. Thus, this court does not find deficits in the area of health and safety.

Finally, the court further disagrees with the assessment that petitioner suffers deficits in the area of functional academics. The court does not disagree that the petitioner has deficits in the area of reading proficiency and language skills, but finds petitioner's deficits are more in the area of communication than functional academics. Petitioner only attended school in the United States for one year, and attended school in Vietnam sporadically for a total of only two years. To the court's knowledge, no records exist from the school(s) in Vietnam. Moreover, on the one test designed to determine petitioner's functional academic level, petitioner's score was not below average. Dr. Grant testified that he administered the Kaufman Functional Academic Skills Test and petitioner's functional academic score was 79. In looking at the individual parts of the test, petitioner's math score was much higher than his reading score. Other testing seemed to indicate the same pattern. Despite the fact that these tests may indicate some academic deficit in the area of reading, this court finds it is unable to say such results indicate an overall deficit in the area of functional academics. This is especially true in light of the court's conclusion that petitioner does have deficits in communication and Dr. Grant's testimony that all of the tests were given in English without the aid of an interpreter. While, Dr. Grant maintains the petitioner's English skills are better than his Vietnamese, this court finds this fact significant in evaluating the weight to be given to Dr. Grant's conclusions. Given the fact that the petitioner's functional academic score was 79; the fact that the petitioner may have had difficulty understanding the testing due to the language barrier; the fact that petitioner has a very limited formal education; and the fact that the only areas where petitioner showed deficiencies were in

the areas involving language skills, this court finds the evidence does not establish deficits in the area of functional academics.

Therefore, although this court finds petitioner has deficits in one of the criteria listed in the Manual of the American Association of Mental Retardation, 9th Edition, namely, communication, this is not enough to conclude petitioner has deficits in adaptive behavior. Petitioner must demonstrate deficits in at least two of the listed criteria; thus, petitioner has failed to demonstrate that he has deficits in adaptive behavior as required by Tenn. Code Ann. §39-13-203(a)(2).

Regardless, even if this court were to find petitioner has deficits in adaptive behavior, per the requirements of part (a)(2) of the statute, this court also finds petitioner has failed to demonstrate that any such deficits manifested during the developmental period as required by part (a)(3) of the statute.

**C. Onset Before the Age of Eighteen (18):**

Since this court finds petitioner has failed to demonstrate that he suffers from deficits in adaptive behavior, it is not necessary to consider whether the deficits in intellectual functioning manifested before the age of eighteen. Nevertheless, since the court did find deficits in intellectual functioning, it will provide a cursory examination of the evidence presented on this issue and its findings with regard to that proof.

Initially, both the State and the petitioner concede that no test of intellectual functioning was performed prior to the age of eighteen (18). Additionally, both agree that,

in fact, no such testing was performed prior to the petitioner's incarceration. Petitioner was not tested until approximately ten years after his arrest for these crimes. Petitioner has now been incarcerated for approximately seventeen years. Thus, based on the testing alone, this court is unable to say and petitioner is unable to demonstrate, that he meets the final prong of the statutory criteria. Moreover, after reviewing the testimony of the experts and the social history presented by Doan Dinh at the first Post-Conviction Hearing, this court finds petitioner has failed to adequately demonstrate that he suffered deficits in intellectual functioning before the age of eighteen (18). Although both Dr. Auble and Dr. Grant surmise the deficits occurred prior to age eighteen, neither can offer any real proof to that effect and their testimony on this issue is largely speculative.

Relying on the social history performed by Doan Dinh, interviews with petitioner and his mother, and other records from petitioner's childhood, Dr. Grant testified that he believed petitioner developed deficits in intellectual functioning prior the age of eighteen (18). Specifically Dr. Grant cited the following facts in reaching this conclusion: petitioner did not speak until six (6) years old; petitioner was not toilet trained until the age of five (5); petitioner did not perform well during what limited formal education he did receive; and petitioner continues to have limited language skills.

Referencing on much of the same information, Dr. Auble also surmised that certain facts regarding the petitioner's childhood indicated that he experienced neurological deficits prior the age of eighteen (18). Dr. Auble specifically discussed certain facts related to the petitioner's mother. She testified that petitioner's mother

was poor during the pre-natal period; and thus, received no prenatal treatment; petitioner's mother suffered from malnutrition during her pregnancy and actually fell during the pregnancy; petitioner's mother smoked a half a pack of cigarettes a day while pregnant; and petitioner's mother herself had a very low I.Q. Additionally, Dr. Auble stated that the petitioner received no medical treatment during early childhood; petitioner suffered childhood malnutrition; petitioner suffered seizures as a child and was often sick; petitioner potentially suffered a traumatic brain injury when he hit his head on the bottom of a pool and also as a result of a soccer injury. She further testified that because the petitioner lived in poverty and was at times homeless, he had poor post-natal socialization. She indicated that the petitioner had only approximately two and a half years of formal education and the petitioner was both abused and severely neglected during his early childhood. Dr. Auble explained that these circumstances provided conditions whereby petitioner was likely to develop brain dysfunction. She further testified that it was her opinion that such dysfunction was in fact manifested in early childhood as evidenced by the same circumstance relied upon by Dr. Grant.

First, this court notes that much has been made with regard to the petitioner's inability to speak at an early age. However, the only actual testimony accounting this detail comes from Doan Dinh, who alleges it was reported to him by petitioner's mother. As has been previously referenced, the petitioner's early childhood was by all accounts a miserable existence. It appears he and his mother lived on the streets for some time. Also, because petitioner's father was American, his mother hid his birth from her family and petitioner was not allowed to go to school. Thus, it is

unclear to what extent the petitioner received any sort of socialization during the first year of his life. This court will not speculate about petitioner's situation, but given the testimony of Doan Dinh, it is clear there could be a multitude of reasons why, as a child, petitioner did not speak or only spoke in a limited fashion. Therefore, this fact, alone, does not persuade the court that petitioner's deficits manifested in childhood. Additionally, the court is unpersuaded by the lack of toilet training. It is unclear whether petitioner's mother made any attempt to perform the duties of a "traditional" care taker. Thus, without any instruction in either of these areas, it's possible such late development was a result of neglect rather than neurological deficit. Secondly, it is not surprising, given the circumstances in which he was raised, that petitioner did not perform well in school. He was enrolled in school sporadically, he lived on the street and possibly suffered from both neglect and abuse. Again, there may be many causes other than neurological impairment that account for bad academic performance. The same is true for his limited ability to speak Vietnamese.

Moreover, Dr. Auble's testified on cross-examination that she can not say for certain that the petitioner actually suffered an early childhood brain injury. As to the other facts listed by Dr. Auble, regarding the petitioner's mother and his childhood illnesses and neglect, again this court does not find that such facts automatically indicate that neurological deficits occurred prior to the age of eighteen.

Finally, neither party disputes that petitioner suffers from paranoid schizophrenia. Petitioner was diagnosed with the disease over ten years ago, and testimony by at least one expert expressly indicated that over time the disease would erode brain functioning. Thus, it is just as

likely that any deficits in intellectual functioning occurred as a result of both this disease; and thus, did not develop until after the age of eighteen.[11] Petitioner suffered from schizophrenia for nearly eight years prior to being diagnosed and treated. By the time the first I.Q. test was conducted petitioner had likely been suffering from the disease for seven years, and he was not receiving treatment during those seven years. Unlike, the first prong of the statute, where petitioner must demonstrate a concrete fact, namely, that he has an I.Q. of seventy or less, this prong of the statute is more akin to the prong addressing adaptive behavior, in that it is more subjective. However, onset before the age of eighteen can be demonstrated in a variety of ways, school records, medical records, documented social history, and observations and testimony of the evaluating experts. In this case there are no school records, no medical records, very little documented social history and the observations of the experts on this point are speculative at best. Additionally, there is evidence that tends to establish a legitimate alternative explanation for the petitioner's below average I.Q. scores. Admittedly, Dr. Kenner could not say for sure how the petitioner would be effected. However, neither Dr. Grant nor Dr. Auble could say definitively that the disease had not effected petitioner's neurological functioning.

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[11] While this court finds that, under *Van Tran*, 66 S.W.3d 790 and *Howell*, this fact may not be significant in evaluating whether petitioner meets the first prong of the statute, in that an I.Q. of seventy or below is all that is required regardless of how or when the deficit occurred, it does find petitioner's schizophrenic condition has significance in evaluating the third prong of the statute, which specifically addresses the question of when the deficits described in part (a)(1) and (a)(2) occurred.

Having determined that, in light of the proof presented, it is not possible to discern when the petitioner's deficits in intellectual functioning developed, this court finds petitioner has also failed to meet his burden with respect to the third prong of the statute. Therefore, even if petitioner had been able to demonstrate that he suffered from deficits in adaptive behavior, this court still would find petitioner failed to demonstrate by a preponderance of the evidence that he is mentally retarded as defined by Tenn. Code Ann. § 39-13-203.

## CONCLUSION

Petitioner clearly meets the statutory requirements of Tenn. Code Ann. § 39-13-203(a)(1), in that, he has demonstrated that he has significant subaverage general intellectual functioning as evidence by a functional IQ of seventy (70) or below. However, this court finds petitioner has failed to demonstrate that he has deficits in adaptive behavior as required by section (a)(2) of the statute. Additionally, even if petitioner were able to demonstrate the required deficits under part (a)(2), this court finds petitioner has failed to demonstrate that either his subaverage general intellectual functioning or any deficits under either part (a)(2), were manifested during the developmental period.

Therefore, having found petitioner has failed to meet his burden with respect to each prong of the statutory definition of mental retardation, his Motion to Reopen his Post Conviction Petitioner, is hereby, **DENIED**.

5-5-05
Date

/s/ John P. Colton, Jr.
John P. Colton, Jr.
Shelby County Criminal Court
Division III

IN THE SUPREME COURT OF TENNESSEE
AT JACKSON

**HECK VAN TRAN v. STATE OF TENNESSEE**

**Criminal Court for Shelby County**
**No. P-14409**

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**No. W2005-01334-SC-R11-PC**

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**ORDER**

(Filed Apr. 16, 2007)

Upon consideration of the application for permission to appeal of Heck Van Tran, and the record before us, the application is denied.

PER CURIAM

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**UNITED STATES CONSTITUTION**

U.S. Const. Amend. VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "

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U.S. Const. Amend. VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

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U.S. Const. Amend. XIV, Section 1

"[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

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**TENNESSEE CODE ANNOTATED § 39-13-203**

Mentally retarded defendants – Death sentence prohibited.

(a) As used in this section, "mental retardation" means:

(1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;

(2) Deficits in adaptive behavior; and

(3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

(b) Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of

committing first degree murder shall be sentenced to death.

(c) The burden of production and persuasion to demonstrate mental retardation by a preponderance of the evidence is upon the defendant. The determination of whether the defendant was mentally retarded at the time of the offense of first degree murder shall be made by the court.

(d) If the court determines that the defendant was a person with mental retardation at the time of the offense, and if the trier of fact finds the defendant guilty of first degree murder, and if the district attorney general has filed notice of intention to ask for the sentence of imprisonment for life without possibility of parole as provided in § 39-13-208(b), the jury shall fix the punishment in a separate sentencing proceeding to determine whether the defendant shall be sentenced to imprisonment for life without possibility of parole or imprisonment for life. The provisions of § 39-13-207 shall govern the sentencing proceeding.

(e) If the issue of mental retardation is raised at trial and the court determines that the defendant is not a person with mental retardation, the defendant shall be entitled to offer evidence to the trier of fact of diminished intellectual capacity as a mitigating circumstance pursuant to § 39-13-204(j)(8).

(f) The determination by the trier of fact that the defendant is not mentally retarded shall not be appealable by interlocutory appeal, but may be a basis of appeal by either the state or defendant following the sentencing stage of the trial.

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(2)

No. 07-62

In The

# Supreme Court of the United States

HECK VAN TRAN,

*Petitioner,*

v.

STATE OF TENNESSEE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Tennessee Court Of Criminal Appeals**

## RESPONDENT'S BRIEF IN OPPOSITION


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## CAPITAL CASE
## QUESTIONS PRESENTED

1. Does the failure of the states to apply a uniform clinical definition of mental retardation and to interpret the definition in accord with scientific principles violate the Eighth and Fourteenth Amendments to the United States Constitution?

2. Do the states violate Due Process of Law by using fact-finding procedures to evaluate a defendant's mental retardation that produce unreliable and inconsistent results that cannot be reconciled with a reasonable interpretation of *Atkins v. Virginia*?

3. Does the failure of the states to require that a jury determine whether a capital defendant is mentally retarded, beyond a reasonable doubt, before the defendant may be sentenced to death violate the Sixth Amendment and the principles of *Apprendi v. New Jersey* and *Ring v. Arizona*?

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## OPINION BELOW

The opinion of the Tennessee Court of Criminal Appeals that is the subject of this petition is unpublished. (Pet. App. 1)

## STATEMENT OF JURISDICTION

The judgment of the Tennessee Court of Criminal Appeals affirming the trial court's denial of post-conviction relief was filed November 9, 2006. (Pet. App. 1) The Tennessee Supreme Court denied petitioner's request for discretionary review on April 16, 2007. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

## STATUTORY PROVISION INVOLVED

The relevant provision of Tennessee's capital sentencing statute defining mental retardation, Tenn. Code Ann. § 39-13-203 (2003), provides as follows:

> **Mentally retarded defendants – Death sentence prohibited.** – (a) As used in this section, "mental retardation" means:
>
> (1) Significantly subaverage general intelligence functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and

(3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.

## STATEMENT OF THE CASE

### I. Procedural History

In 1989, the petitioner, Heck Van Tran, was convicted of three counts of first-degree felony murder for the shooting deaths of Kai Yin Chuey, Amy Lee and Arthur Lee. A jury sentenced the petitioner to death for each of the murders. Additionally, the jury found the petitioner guilty of robbery by use of a deadly weapon, and the trial court sentenced him to 30 years' imprisonment for this conviction, to be served concurrently to the petitioner's death sentences. On direct appeal, the Tennessee Supreme Court affirmed the petitioner's felony murder conviction and death sentence as to Kai Yin Chuey. The Court also affirmed the petitioner's felony murder convictions for the murders of Amy and Arthur Lee; however, it reversed the petitioner's death sentences for these murders, finding that the jury had incorrectly applied a statutory aggravating circumstance. *State v. Van Tran*, 864 S.W.2d 465, 480 (Tenn. 1993). On remand, the defendant received two concurrent life sentences for the murders of Amy and Arthur Lee.

On March 7, 1995, the petitioner filed a petition for post-conviction relief in the Shelby County Criminal Court, alleging, *inter alia*, that he was incompetent to

be executed. Following a hearing, the trial court denied post-conviction relief, and the Tennessee Court of Criminal Appeals affirmed. *Van Tran v. State*, C.C.A. No. 02C01-9803-CR-00078, 1999 WL 177560 (Tenn. Crim. App. Apr. 1, 1999).

Petitioner then filed an application for permission to appeal to the Tennessee Supreme Court, which was granted on the issue of whether a petitioner could raise a claim of incompetency for execution in a petition for post-conviction relief. On review, the court determined that a proceeding for post-conviction relief is not the appropriate avenue for litigating the issue of competency to be executed. Therefore, the court refused to consider the petitioner's competency claim. *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

On February 7, 2000, the petitioner filed a motion to re-open his petition for post-conviction relief, alleging that he is mentally retarded, and, therefore, may not be executed under Tenn. Code Ann. § 39-13-203. The trial court denied the petitioner's motion to reopen, and the Court of Criminal Appeals denied the petitioner permission to appeal. *See* Tenn. Code Ann. § 40-30-117(c) ("If the motion [to reopen] is denied, the petitioner shall have ten (10) days to file an application in the court of criminal appeals seeking permission to appeal."). The petitioner then filed an application for permission to appeal to the Tennessee Supreme Court, which the court granted. On review, the court held, for the first time in Tennessee, that execution of a mentally retarded criminal defendant

violates the Eighth Amendment of the United States Constitution, as well as Article 1, § 16, of the Tennessee Constitution. It also held that the prohibition against executing a mentally retarded defendant was a new constitutional rule warranting retroactive application to cases on collateral review and, as such, could be raised in a motion to reopen a petition for post-conviction relief. Accordingly, it remanded the case for a hearing on the issue of the petitioner's mental retardation. *Van Tran v. State*, 66 S.W.3d 790 (Tenn. 2001).

Following an evidentiary hearing, the trial court concluded that petitioner was not mentally retarded as defined by Tenn. Code Ann. § 39-13-203. The Tennessee Court of Criminal Appeals affirmed, finding ample evidence in the record to support the trial court's conclusion that petitioner failed to prove that he is mentally retarded by a preponderance of the evidence. *Van Tran v. State*, No. W2005-01334-CCA-R3-PD, 2006 WL 3327828 (Tenn. Crim. App. Nov. 9, 2006) (perm. app. denied). (Pet. App. 1) Petitioner sought discretionary review by the Tennessee Supreme Court under Tenn. R. App. P. 11(a), but the Court denied his request on April 16, 2007.

## II. Facts Pertinent to the Petition

Under Tennessee law, mental retardation is defined as: (1) significantly sub-average intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below; (2) deficits in

adaptive behavior; and (3) the mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age. Tenn. Code Ann. § 39-13-203. All three criteria must be satisfied to render a defendant ineligible for the death penalty in Tennessee.

Following an evidentiary hearing, the state post-conviction court concluded that petitioner failed to meet two of the three criteria. Although the court found that petitioner had demonstrated that he currently had an I.Q. of 70 or below, it concluded that petitioner failed to demonstrate deficits in adaptive behavior or that any such deficits manifested during the developmental period. (Pet. App. 28-35) The Tennessee Court of Criminal Appeals affirmed, observing that "the ultimate issue of whether a person is, in fact, mentally retarded for purposes of the constitutional ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility." (Pet. App. 50) Taking into account the "unique circumstances" of the petitioner's case – including his social history of abuse, neglect and social ostracism, the fact that he "lived on the streets" in Vietnam until coming to this country at age 17, his limited formal education both in Vietnam and in the United States, his limited proficiency with the English language, a history of drug and alcohol abuse, and a diagnosis of paranoid schizophrenia – the court concluded that the record supported the trial court's finding that petitioner was not

mentally retarded as defined in Tenn. Code Ann. § 39-13-203.

> The circumstances of every case are unique as are the circumstances of every defendant. Circumstances exist in this case which cloud the picture, particularly contradictory proof regarding the Petitioner's Vietnamese background, *i.e.*, whether Vietnamese or English is the Petitioner's proficient language. . . . Additionally, extraneous factors, i.e., drug use and mental illness, further skew the determination of mental retardation. These factors, in connection with the requirement that experts must speculate retrospectively as to what conditions existed prior to the age of eighteen and the obvious motivation in making such claim, further complicate this court's duty on appeal. We defer to the trial court's determinations of credibility and adopt the trial court's ultimate findings of fact.

(Pet. App. 55-56)

Petitioner now seeks an appeal to this Court.

## ARGUMENT

### I. TENNESSEE'S STATUTORY DEFINITION OF MENTAL RETARDATION AND PROCEDURES FOR DETERMINING MENTAL RETARDATION DO NOT CONFLICT WITH THIS COURT'S DECISION IN *ATKINS V. VIRGINIA*.

Petitioner contends that certiorari is warranted to address the failure of the states to apply a uniform clinical definition of mental retardation and to "interpret that definition in accordance with scientific principles." This failure, according to the petitioner, violates the Eighth and Fourteenth Amendments to the United States Constitution. However, this Court has never established a constitutional definition for mental retardation. To the contrary, in *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court explicitly left to the individual states "the task of developing appropriate ways to enforce the constitutional restrictions upon its execution of sentences." *Atkins*, 536 U.S. at 317 (quoting *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)). *See also Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002) (*Atkins* did not conclusively define mental retardation); *Pruitt v. State*, 834 N.E.2d 90, 107 (Ind. 2005) (same); *Gray v. State*, 887 So.2d 158, 168 (Miss. 2004) ("Determining who is mentally retarded for purposes of this prohibition has been left to the individual States."); *Johnson v. State*, 102 S.W.3d 535, 540 (Mo. 2003) ("*Atkins* did not define the perimeters of mental retardation, but left 'to the States the task of' " enforcing the restriction).

In 1991, the Tennessee General Assembly enacted Tenn. Code Ann. § 39-13-203, which provides in part as follows:

> (a) As used in this section, "mental retardation" means:
>
> (1) Significantly subaverage general intellectual functioning as evidenced by a functional intelligence quotient (I.Q.) of seventy (70) or below;
>
> (2) Deficits in adaptive behavior; and
>
> (3) The mental retardation must have been manifested during the developmental period, or by eighteen (18) years of age.
>
> (b) Notwithstanding any provision of law to the contrary, no defendant with mental retardation at the time of committing first degree murder shall be sentenced to death.

Tenn. Code Ann. § 39-13-203 (1991).

Ten years later, in *Van Tran v. State,* 66 S.W.3d 790 (Tenn. 2001), the Tennessee Supreme Court held that "execution of a mentally retarded individual violates the Eighth Amendment to the United States Constitution and article I, § 16 of the Tennessee Constitution." *Van Tran*, 66 S.W.3d at 812. The state court reached this conclusion after "surveying the national landscape," as evidenced by legislative enactments and jury studies, and considering the societal consensus in Tennessee, as reflected in the "overwhelming vote and comments of the legislature"

in enacting Tenn. Code Ann. § 39-13-203. *Id.* at 801-05. In reviewing Tennessee's mental retardation statute, the Court observed that "the statutory definition of mental retardation in Tennessee adopts the nationally accepted definition of mental retardation." *Id.* at 794 (citing *Penry v. Lynaugh*, 492 U.S. 302, 308 n.1 (1989)). The Court thus directed application of the statutory definition of mental retardation set forth in Tenn. Code Ann. § 39-13-203 as the constitutional standard for Tennessee offenders. *See Van Tran*, 66 S.W.3d at 812 ("The applicable criteria [to determine petitioner's alleged mental retardation] are those presently set forth by statute").[1]

Six months after the Tennessee Supreme Court's decision in *Van Tran*, this Court held that execution of the mentally retarded constitutes cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution, which therefore places a substantive restriction on the state's power to execute a mentally retarded offender. *Atkins*, 536 U.S. at 321. Unlike the Tennessee Supreme Court, however, this

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[1] The Tennessee Supreme Court has interpreted provisions of the statutory definition twice since then. In *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004), the Court held that a strict application of the statutory criteria for retardation under § 39-13-203, specifically the numeric I.Q. requirement, was not contrary to this Court's holding in *Atkins* nor out of line with the standard adopted by numerous other states. In *Strode v. State*, __ S.W.3d __, No. M2005-00906-SC-R11-DD, 2007 WL 2316355 (Tenn. Aug. 14, 2007), the Court made clear that Tennessee law requires that mental retardation manifest by 18 years of age.

Court specifically refrained from imposing its own definition of the condition, although specifically noting that the various statutory definitions of mental retardation in effect at that time, including Tennessee's, while not identical, "generally conform to the clinical definitions," which require significantly subaverage intellectual functioning existing concurrently with related limitations in two or more adaptive skill areas and manifesting before age 18. *Atkins*, 536 U.S. at 309, n.3, 314 n.12, 317 n.22.

Petitioner contends that state legislatures have not adopted a uniform definition of mental retardation in the aftermath of *Atkins*. But, as noted above, the Court recognized the possibility of some variation among state standards, though suggesting that at least "general conformity" with clinical definitions may be required. More importantly, the Court recognized Tennessee's statute as falling among those forming the "national consensus" on which the *Atkins* prohibition was grounded. In short, Tennessee's definition falls within the range of flexibility allowed by the consensus found in *Atkins*.

Moreover, petitioner's specific complaints about disparate standards bear little relation to his own case. For example, petitioner challenges Tennessee's demarcation of an I.Q. of 70 as the boundary of intellectual functioning for mental retardation as inconsistent with the American Association of Mental Retardation and some other states. However, in this case, the trial court concluded that petitioner had, in fact, satisfied this statutory criterion in that "he

currently has a functional intelligence quotient of seventy (70) or below." The Court of Criminal Appeals agreed with the trial court's assessment. (Pet. App. 43)

Petitioner's complaints about the Tennessee courts' assessment of his adaptive behavior limitations amounts to little more than a disagreement with the state courts' factual findings. In assessing this criterion, the Tennessee Court of Criminal Appeals specifically applied the standard espoused by the American Psychiatric Association, which was cited by this Court in *Atkins* as being among the clinical definitions about which there was a national consensus in the area of capital punishment. *Atkins*, 536 U.S. at 309 n.3, 317 n.22. Moreover, the state court's determination in this instance was largely fact-bound under the unique circumstances of the petitioner's case. For example, the state court noted that the weight accorded standardized testing devices was lessened by petitioner's atypical life experience[2]

[2] After spending much of his young life on the streets of Vietnam, petitioner spent only three years as a free person in this country before being incarcerated for the ten years that preceded administration of the testing related to this case. As a result, "due to the unique circumstances of the petitioner's background, some of the questions posed on the Independent Living Scale border on the absurd." (Pet. App. 50) Likewise, the Vineland test asks participants to "evaluate the petitioner as if he were a functioning member of this society." Yet, as the state court observed, "[w]hen the test was administered, the petitioner had been incarcerated for over ten years . . . in a manner that severely restricts his activities and in a manner that

(Continued on following page)

and the fact that the petitioner, whose first language is Vietnamese, "has a limited grasp of the English language." (Pet. App. 32) The court also gave little weight to deficits in reading proficiency and language skills after observing that the petitioner "only attended school in the United States for one year and attended school in Vietnam sporadically for a period of only two years." (Pet. App. 33) In addition, the state court's decision was properly informed by the petitioner's own actions in the planning, perpetration, escape and aftermath of the murders in this case. (Pet. App. 51-52)

As the Tennessee Court of Criminal Appeals observed, the "adaptive behavior criteria are exceedingly subjective," and, ultimately, "the issue of whether a person is, in fact, mentally retarded for purposes of the constitutional ban on excessive punishment is one for the finder of fact, based upon all of the evidence and determinations of credibility." (Pet. App. 50)

> We agree with the trial court's assessment that the Petitioner is in a unique position. The Petitioner was born in Vietnam. There is no question that Petitioner's childhood was

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provides a strictly controlled environment." The court thus gave little weight to tests given to his mother – who had little opportunity to observe the petitioner in a traditional setting and is herself "barely a functioning member of this society" – and to a prison guard – who has never observed the petitioner in any environment other than a strictly controlled prison setting. (Pet. App. 50-51)

> atypical. His social history reveals abuse, neglect, and social ostracism. He essentially "lived on the streets" until age seventeen when he came to this country through the assistance of Catholic Charities. The Petitioner's formal schooling was limited to several years in Vietnam and about one year in this country. The Petitioner has spent the majority of his time in this country incarcerated. While the Petitioner's experts maintained that the Petitioner was more proficient in the English language than in Vietnamese, proof at the Petitioner's original post-conviction hearing indicated that the Petitioner had difficulty communicating with trial counsel until a Vietnamese interpreter was appointed. A social worker with Catholic Charities testified that the Petitioner spoke and understood the Vietnamese language. The Petitioner has a history of drug and alcohol use. The Petitioner has also been diagnosed with paranoid Schizophrenia. The proof also corroborates the trial court's conclusion that the Petitioner was in a position unique to most American adults. . . . Accordingly, we agree with the trial court's assessment that little weight should be given to the Petitioner's below average score on the Independent Living Scale.

(Pet. App. 50-51)

Finally, while it is true that Tennessee strictly adheres to a requirement that mental retardation be manifest by 18 years of age, *see Strode, supra* n.1, the

state's rule of strict adherence was in no way dispositive in petitioner's case. As the Tennessee Court of Criminal Appeals noted, petitioner had not been administered *any* test of intellectual functioning before reaching 18 years of age, and no testing was performed until ten years after his incarceration at age 22. (Pet. App. 54)

> The only proof establishing this third prong were reliance upon social factors present in the Petitioner's childhood, including extreme poverty and child abuse. In this regard, we cannot conclude that the trial court's conclusion that the Petitioner's late development could have been the result of "neglect" rather than neurological deficit was in error or contrary to the evidence. The evidence of poverty, child abuse, lack of education, family dysfunction and poor social conditions are not enough to demonstrate that any deficits manifested during the developmental period. The proof established that the Petitioner supported himself, took care of others, and was employed. The proof also established that the Petitioner, with the aid of an interpreter, was able to assist and communicate with his trial attorneys. The occurrences of these abilities all occurred after the age of eighteen.

(Pet. App. 54-55) Moreover, the definition of mental retardation held by both the American Association on Mental Retardation and the American Psychiatric Association require manifestation before the age of 18. *Atkins*, 536 U.S. at 309 n.3.

While petitioner cites numerous cases in an attempt to demonstrate some disparity in standards, this case plainly illustrates that a mental-retardation inquiry is inherently fact-bound. Contrary to petitioner's contentions, his death sentence is not the result of any arbitrariness and disparity in the state-court implementation of *Atkins*. Petitioner was sentenced to death in 1989 after a Tennessee jury found, beyond a reasonable doubt, that his commission of first-degree murder was "especially cruel in that it involved depravity of mind" and was part of "mass murder," and that these aggravating factors were not outweighed by any mitigating circumstances. *Van Tran*, 864 S.W.2d at 470. Petitioner remains under a death sentence because he failed to demonstrate in the aftermath of *Atkins* that he is mentally retarded under Tennessee's statutory definition – the same definition that comprised the body of state statutes forming the "national consensus" which provided the basis of the constitutional prohibition recognized in *Atkins*.

Finally, petitioner's argument concerning disparate fact-finding procedures provides no basis for a grant of certiorari. In *Atkins*, this Court held that executing some mentally retarded offenders is prohibited by the Eighth Amendment while leaving to the states the task of developing a means of determining which offenders are sufficiently impaired in intellectual functioning and adaptive skills to be exempt from capital punishment. *Atkins*, 536 U.S. at 317-18. The State of Tennessee afforded petitioner counsel,

funding for multiple mental health experts, and an opportunity to be heard in the trial court on his retardation claim. He was afforded an appeal as of right to the Tennessee Court of Criminal Appeals and an opportunity for discretionary review by the Tennessee Supreme Court. Although couched in due process terms, petitioner's argument is, in essence, an invitation for this Court to correct what he deems to be erroneous factual findings regarding mental retardation by the Tennessee courts, a purpose for which certiorari is rarely granted. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."). The current petition represents little more than a debate on the sufficiency of the evidence supporting the state court's conclusion, based on the unique circumstances of his case, that petitioner is not mentally retarded, and provides no proper basis for certiorari.

Because petitioner cannot show that the standard in Tennessee or that the procedures employed in his case fail to comport with the constitutional standard announced in *Atkins*, certiorari under Sup. Ct. R. 10(c) is not warranted.

## II. TENNESSEE'S STATUTORY PROCEDURE FOR DETERMINING MENTAL RETARDATION IN THE CAPITAL PUNISHMENT CONTEXT DOES NOT CONFLICT WITH THIS COURT'S DECISION IN *RING V. ARIZONA*.

Finally, petitioner contends that certiorari is warranted to enable this Court to declare that the "absence of mental retardation" constitutes an element of capital murder, which must be determined beyond a reasonable doubt by a jury under the principles set forth in *Ring v. Arizona*, 536 U.S. 584 (2002). Under Tennessee law, a judge rather than a jury determines the issue of mental retardation. Tenn. Code Ann. § 39-13-203(d). *See also Van Tran*, 66 S.W.3d at 812 (remand order directing trial court to make determination on mental retardation). The decision in *Ring* does not require a different result in this case or any other. And even if *Ring* could be read to impose such a requirement in the mental retardation context, the procedural rule announced in *Ring* is not retroactively applicable to cases, like petitioner's, on collateral review of a final criminal judgment. *See Schriro v. Summerlin*, 542 U.S. 348, 358 (2004) (*Ring* properly classified as procedural rather than substantive and, thus, did not apply to death penalty case already final on direct review). *See also Teague v. Lane*, 489 U.S. 288, 301 (1989) ("unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced").

In *Ring*, this Court held that Arizona's enumerated *aggravating factors* "operate as the functional equivalent of an element of a greater offense" and must be found by a jury, rather than a judge, under the Sixth Amendment's jury trial guarantee. *Ring*, 536 U.S. at 609. The Court made clear that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). However, as the Fourth Circuit observed in *Walker v. True*, 399 F.3d 315, 326 (4th Cir. 2005), a finding of retardation does not increase the penalty for the crime beyond that authorized by the jury's verdict alone. *See also In re Johnson*, 334 F.3d 403, 405 (Va. 2003) ("[T]he absence of mental retardation is not an element of the offense any more than sanity is an element of the offense.").

Tennessee's capital sentencing scheme avoids the constitutional infirmity identified in *Ring* because it requires that the jury find any statutory aggravating circumstance beyond a reasonable doubt. Tenn. Code Ann. § 39-13-204(f)(1), (i) (2003). Moreover, as the Tennessee Supreme Court noted in *Howell v. State*, 151 S.W.3d 450 (Tenn. 2004) – in which it rejected the notion that a capital defendant is entitled to a jury determination of retardation – Tennessee's position "is in line with an ever-growing number of courts to have considered the issue and held likewise." *Howell*, 151 S.W.3d 467 (citing, *inter alia, In re Johnson*, 334

F.3d 403 (5th Cir. 2003); *Russell v. State*, 849 So. 2d 95 (Miss. 2003); *State v. Flores*, 93 P.3d 1264 (N.M. 2004); *Head v. Hill*, 587 S.W.2d 613 (Ga. 2003); *State v. Lott*, 779 N.E.2d 1011 (Ohio 2002)). Indeed, petitioner here identifies no decision of another state court of last resort or federal court of appeals that holds to the contrary.

Certiorari is not warranted under Sup. Ct. R. 10(b) or (c).

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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